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## WEST VIRGINIA AND THE UNIFORM PROBATE CODE: AN OVERVIEW Part I

EARL M. CURRY, JR.\*

### INTRODUCTION

Just as the decade of the sixties was the era of reform for commercial law, the decade of the seventies is becoming the era of probate reform. In August 1969, the National Conference of Commissioners on Uniform State Laws promulgated the results of seven years of study<sup>1</sup> in the Uniform Probate Code.<sup>2</sup> That same month the House of Delegates of the American Bar Association gave its approval to the new Uniform Code.<sup>3</sup> The introduction of the Uniform Probate Code provides a timely and much needed vehicle for probate reform.

In recent years there has been considerable public criticism of existing probate practices,<sup>4</sup> and the Uniform Probate Code may

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<sup>1</sup>Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70s*, 2 CONN. L. REV. 453 (1970) [hereinafter cited as Wellman].

<sup>2</sup>NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UNIFORM PROBATE CODE].

<sup>3</sup>*Uniform Probate Code*, 55 A.B.A.J. 976 (1969).

Because of the increasing mobility of the population of the United States and the obvious benefits to the public of standardized probate laws, simplified probate procedures and uniform systems of death taxes, it would seem desirable that every jurisdiction consider promptly the enactment of legislation that will bring its laws and procedures into closer conformity with those of other jurisdictions. Enactment of the Uniform Probate Code would be a major and beneficial step toward this desirable goal.

*Statement of Principles Regarding Probate Practices and Expenses*, 8 REAL PROP., PROBATE & TRUST J. 293, 299 (1973).

<sup>4</sup>N. DALEY, *HOW TO AVOID PROBATE* (1965); M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968); Bloom, *At Last: A Way to Settle Estates Quickly*, *READER'S*

well be "an idea whose time has come."<sup>5</sup> Unlike most recent local attempts to reform—which have generally ended in a modest amount of tinkering with the existing probate system—none of which addresses the major issues,<sup>6</sup> the Uniform Probate Code meets problems head on. The fundamental issue is: Why should probate administration, any more than any other area of our private business dealings, be under the supervision of the courts in the absence of an actual dispute? Certainly, no one would suggest that contracts entered into by competent, consenting parties should be under mandatory court supervision unless a dispute arises that the parties are unable to resolve. Is there any greater policy reason to require this mandatory court supervision in the probate of estates in the absence of disputes among the parties or creditors?<sup>7</sup> In England, for example, the majority of estates are handled without a judicial proceeding after the grant of probate or administration. "The personal representative simply collects the assets, pays claims and expenses of administration, distributes the residue to the persons entitled under the will or the intestate distribution statutes and secures discharges from the distributees."<sup>8</sup>

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DIGEST, Sept., 1972, at 193; Bloom, *Time to Clean Up Our Probate Courts*, READER'S DIGEST, Jan., 1970, at 112; Bloom, *The Mess in Our Probate Courts*, READER'S DIGEST, Oct., 1966, at 102; Taylor, *You Can Avoid the Probate Trap*, READER'S DIGEST, June, 1970, at 93.

<sup>5</sup>The Uniform Probate Code has been enacted in full in five states; in Idaho and Alaska the Code is presently in effect; Arizona's new code becomes effective in January, 1974, followed by Colorado in July, 1974, and North Dakota in July, 1975. Oregon and Wisconsin are in the process of revising their relatively new codes, both of which are patterned after early drafts of the Code, bringing them into conformity with the Official Text. Maryland's 1968 code was based on the Second Working Draft of the Uniform Probate Code, and Maryland claims to be the first state to have legislation modeled on the Uniform Code.

During 1973 the Uniform Code has been introduced in the the legislatures of California, Delaware, Florida, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey (selected sections), Nebraska, Ohio, South Dakota, Vermont, Washington and Wyoming. In addition, studies of the Code are being made in Alabama, Arkansas, Indiana, Kansas, Kentucky, Missouri, New York, South Carolina, Tennessee (which has already adopted legislation embodying the concepts of Article VI) and Texas. In all, legislators and bar associations in over thirty states have either enacted or are officially considering the enactment of the Uniform Probate Code. See 6 UNIFORM PROBATE CODE NOTES (Oct. 1967).

<sup>6</sup>Ohio's experience is all too typical. See 41 OHIO STATE BAR ASS'N REPORT 1313 (1968).

<sup>7</sup>See Wellman, *supra* note 1, at 459-63 for a description of the development of mandatory supervision in the United States.

<sup>8</sup>W. FRATCHER, PROBATE CAN BE QUICK AND CHEAP: TRUSTS AND ESTATES IN ENGLAND 52 (1968).

Creditors are protected in that the personal representative who fails to pay debts before distributing the estate is personally liable to the creditors, even though he had no notice of their claims.<sup>9</sup> Probate without notice is not uncommon in the United States.<sup>10</sup> Many states, including West Virginia,<sup>11</sup> provide for ex parte or common form probate, where the will is admitted to probate without notice being given to any party.<sup>12</sup> Administration of the probate estate without cumbersome procedures is uncommon, however. The Uniform Code provides simple procedural alternatives to the survivors of decedents that may be used when there is no dispute. Also, the substantive rules have been revised to more closely carry out the probable intent of both the testate and intestate decedent.<sup>13</sup> The Code states as its underlying purposes: “(1) To simplify and clarify the law . . . ; (2) to discover and make effective the intent of a decedent . . . ; (3) to promote a speedy and effective system for liquidating the estate . . . ; (4) to facilitate use and enforcement of certain trusts; (5) to make uniform the law . . . .”<sup>14</sup> Thus, the Code attempts to overcome the problems of high cost and long delay that have become ingrained in most states’ probate bureaucracy.<sup>15</sup>

The Uniform Probate Code focuses its attention on the “affairs of decedents, missing persons, protected persons, minors, capacitated persons . . . [by] consolidating and revising aspects of the law relating to wills and intestacy and the administration and distribution of estates . . . .”<sup>16</sup> In the broadest sense, these areas, generally referred to as “probate law,” cover the administration of decedents’ estates, guardianships, testamentary trusts, and the substantive law of wills and intestate succession.<sup>17</sup>

The Uniform Probate Code is too broad to treat in detail in a

<sup>9</sup>*Id.* at 55.

<sup>10</sup>Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 516-24 (1946).

<sup>11</sup>W. VA. CODE ANN. § 41-5-10 (1966).

<sup>12</sup>Riley, *A Critical Study of the Probate System in West Virginia*, 67 W. VA. L. REV. 22, 31 (1964).

<sup>13</sup>M. SUSSMAN, J. CATES, & D. SMITH, *THE FAMILY AND INHERITANCE* (1970) [hereinafter cited as SUSSMAN]; Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963).

<sup>14</sup>UNIFORM PROBATE CODE § 1-102(b).

<sup>15</sup>Wellman, *supra* note 1, at 463-74.

<sup>16</sup>Preamble to UNIFORM PROBATE CODE.

<sup>17</sup>Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of The Uniform Probate Code And The Law of Ohio*, 34 OHIO ST. L. J. 114, 115 (1973).

single article. The approach of this discussion will be to identify the major topics covered by the Code and the changes they would make in present West Virginia law, and to interject the reasoning and purpose of the draftsmen in relation to each topic. It is hoped this discussion will facilitate a more detailed examination of the Uniform Probate Code by the West Virginia bar and legislature. If a legislative study commission is forthcoming to give consideration to the adoption of the Uniform Probate Code in West Virginia, the author hopes this discussion will be of benefit.

#### ARTICLE I: GENERAL PROVISIONS, DEFINITIONS,<sup>18</sup> AND PROBATE COURT JURISDICTION

The Code contains a general fraud section,<sup>19</sup> designed as a supplemental provision to the other protections provided throughout the Code, which provides a remedy that can be asserted outside the estate settlement process.<sup>20</sup> This would make a significant change in present West Virginia law, since it is well settled in this State that a will can only be impeached within the statutory two year limitation,<sup>21</sup> and that statute is jurisdictional, with limitations upon both the right and the remedy even in cases of fraud.<sup>22</sup> Thus, if a will which has been probated is later discovered to be a forgery, and the forgery is not discovered until after the running of the two year period now provided by the West Virginia statute,<sup>23</sup> the defrauded heirs would have a remedy under the Uniform Code and could bring an action for fraud under this section.<sup>24</sup> Bona fide purchasers for value are protected under this section, but any person who benefited from the fraud, including innocent beneficiaries if the fraud was perpetrated within five years of the time of the action, are not protected.<sup>25</sup> There is no time limit against the wrongdoer (other than a two year limitation from the discovery of the fraud within which period any action must be commenced), but the drafters of the Code felt that there should be some time after which innocent persons cannot be deprived of the property.<sup>26</sup>

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<sup>18</sup>General definitions under UNIFORM PROBATE CODE § 1-201 will be discussed in conjunction with the substantive provisions of the Code to which they relate.

<sup>19</sup>UNIFORM PROBATE CODE § 1-106.

<sup>20</sup>*Id.* § 1-106, Comment.

<sup>21</sup>W. VA. CODE ANN. § 41-5-11 (1966).

<sup>22</sup>Weese v. Weese, 134 W. Va. 233, 58 S.E.2d 801 (1950).

<sup>23</sup>W. VA. CODE ANN. § 41-5-11 (1966).

<sup>24</sup>UNIFORM PROBATE CODE § 1-106, Comment.

<sup>25</sup>*Id.* § 1-106.

<sup>26</sup>Relief against the innocent heir or devisee has not always been available.

The Uniform Probate Code adopts the rules of evidence of the courts of general jurisdiction of the State, unless modified by its more specific provisions.<sup>27</sup> The same evidentiary weight is given to death certificates<sup>28</sup> as under present West Virginia law,<sup>29</sup> and this is extended to other governmental records as well.<sup>30</sup> Under the Uniform Code an unexplained absence of five years raises a presumption of death,<sup>31</sup> while the present West Virginia law requires a seven year absence.<sup>32</sup>

Historically, probate jurisdiction has been statutorily vested in courts of either limited or general jurisdiction.<sup>33</sup> Under the Uniform Code, probate jurisdiction is placed in a court equal in stature to a court of general jurisdiction,<sup>34</sup> and appeals from the probate court rise to the same court that hears appeals from courts of general jurisdiction.<sup>35</sup> Of course, article VIII, § 24 of the West Virginia constitution places jurisdiction in all matters of probate in the county courts of the various counties, with appeals rising de novo to the respective circuit courts. As they are presently constituted, the county courts are primarily administrative as opposed to judicial bodies, seldom equipped to hear and determine matters of a judicial nature. Since the probate jurisdiction of the county courts enjoys constitutional status, it may only be removed through the amendment process. The necessity of such action may prove to be a serious impediment to the enactment of the Uniform Probate Code in West Virginia.

The Code provides for a jury trial, if demanded, in formal testacy proceedings and in any other proceeding where a jury trial is a constitutional right,<sup>36</sup> protections which are also found under

Lowe Foundation v. Northern Trust Co., 342 Ill. App. 379, 96 N.E.2d 831 (1951); Dye v. Parker, 108 Kan. 304, 194 P. 640 (1921); Note, 5 MINN. L. REV. 488 (1921). *Contra*, Pope v. Garrett, 147 Tex. 18, 211 S.W.2d 559 (1948); RESTATEMENT OF RESTITUTION § 184, comment *j* at 752 (1937). *See also* T. ATKINSON, HANDBOOK ON THE LAW OF WILLS § 57 (2d ed. 1953).

<sup>27</sup>UNIFORM PROBATE CODE § 1-107.

<sup>28</sup>*Id.* § 1-107(1).

<sup>29</sup>W. VA. CODE ANN. § 16-5-27 (1972).

<sup>30</sup>UNIFORM PROBATE CODE § 1-107(2).

<sup>31</sup>*Id.* § 1-107(3).

<sup>32</sup>W. VA. CODE ANN. § 44-9-1 (1966).

<sup>33</sup>J. RITCHIE, N. ALFORD, & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 281 (4th ed. 1971); Riley, *A Critical Study of the Probate System in West Virginia*, 67 W. VA. L. REV. 116, 117-25 (1965).

<sup>34</sup>Wellman, *supra* note 1, at 477.

<sup>35</sup>UNIFORM PROBATE CODE §§ 1-302, -308, 3-105, 5-204, -304, -402, 7-204.

<sup>36</sup>*Id.* § 1-306.

existing West Virginia law.<sup>37</sup> In addition, the Code includes a notice system whereby persons not formally before the court may be bound by it,<sup>38</sup> e.g., where an order binding upon a fiduciary will bind the person in whose behalf he acts.<sup>39</sup> This doctrine—virtual representation—is used to bind the unborn or unascertained where his interest is represented by one having a substantially identical interest in the proceeding.<sup>40</sup> In addition, a guardian ad litem may, at the discretion of the court, be appointed to represent interests that otherwise would be inadequately represented.<sup>41</sup> These provisions are consistent with West Virginia case law,<sup>42</sup> but codification of the rules is desirable.

## ARTICLE II: INTESTATE SUCCESSION AND WILLS

### *Part 1. Intestate Succession.*

Through its intestate succession provisions, the Uniform Probate Code attempts to reflect the wishes of the owner of property as to its disposition at his death. In order to make this determination, the drafters of the Code used prevailing will patterns to determine what the property owner who fails to execute a will would probably have done.<sup>43</sup> This determination required the identification of the major characteristics of those who died intestate and an examination of the wills of persons who died testate possessing the same characteristics. From this analysis the drafters were able to determine the probable intent of persons who died intestate.<sup>44</sup> The purpose of establishing a pattern of distribution, as developed by the drafters of the Code, was to provide a suitable distribution for those persons of modest means who rely upon the distribution scheme provided by law.<sup>45</sup>

<sup>37</sup>W. VA. CODE ANN. § 41-5-8 (1966).

<sup>38</sup>UNIFORM PROBATE CODE § 1-403(2), which applies as long as there is no conflict of interest between those before the court and those virtually represented.

<sup>39</sup>*Id.* § 1-403(2)(ii).

<sup>40</sup>*Id.* § 1-403(2)(iii).

<sup>41</sup>*Id.* § 1-403(4). West Virginia has a similar provision for probate in solemn form. W. VA. CODE ANN. § 41-5-5 (1966).

<sup>42</sup>*Hansford v. Tate*, 61 W. Va. 207, 56 S.E. 372 (1907).

<sup>43</sup>UNIFORM PROBATE CODE, Article II, Part 1, General Comment.

<sup>44</sup>The drafters of the Code had available to them empirical studies in Illinois and Ohio. See Sussman *supra* note 13; Dunham, *supra* note 13; Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP., PROBATE & TRUST J. 199, 204 (1968), for a discussion of the procedure used. See also Curry, *supra* note 17, at 116.

<sup>45</sup>UNIFORM PROBATE CODE, Article II, Part 1, General Comment.

This dispositive scheme provides a larger share for the surviving spouse than do the present West Virginia statutes,<sup>46</sup> because most persons with relatively modest estates would prefer that their surviving spouse take the lion's share of their estate.<sup>47</sup> The Uniform Probate Code gives the surviving spouse the entire estate when there are neither issue nor parents of the decedent surviving.<sup>48</sup> This would be consistent with present West Virginia law.<sup>49</sup> If, however, there are either surviving parents,<sup>50</sup> or surviving issue who are also issue of the surviving spouse,<sup>51</sup> then the surviving spouse takes a lump sum of the first \$50,000 of the estate, plus one-half of the balance. Of course, this provision will have the effect of giving the surviving spouse the entire intestate estate in most cases.<sup>52</sup> Under the present West Virginia statutes there is no provision for the surviving spouse to take a lump sum before the division of the estate. The Uniform Code further provides for those cases when there are issue of the decedent who are not also issue of the surviving spouse. In such a case, an equal division of the estate is made between the surviving spouse and the issue *without* a lump sum first going to the surviving spouse.<sup>53</sup> Following the modern trend, the Uniform Code does not make the distinction existing in West Virginia between real property and personalty, but treats both in the same manner.

The Uniform Code also provides that the intestate share of relatives other than the surviving spouse and issue be limited to the grandparents of the decedent and their lineal descendants. This is considerably different from present West Virginia law, which allows remote collateral relatives to inherit *ad infinitum*.<sup>54</sup>

<sup>46</sup>W. VA. CODE ANN. §§ 42-1-1, 42-2-1 (1966).

<sup>47</sup>SUSSMAN, *supra* note 13; Dunham, *supra* note 13, at 260.

<sup>48</sup>UNIFORM PROBATE CODE § 2-102(1).

<sup>49</sup>W. VA. CODE ANN. §§ 42-1-1, 42-2-1 (1966).

<sup>50</sup>UNIFORM PROBATE CODE § 2-102(2).

<sup>51</sup>*Id.* § 2-102(3).

<sup>52</sup>In the Cuyahoga County (Cleveland), Ohio study, a five percent random sample was taken of all estates closed by the probate court of that county between November 9, 1964, and August 8, 1965. The median gross estate for testators in this sample was \$15,000; the median for intestate estates was \$6,000. Net estates were \$12,000 and \$3,000 for testate and intestate, respectively. The average net estate for all decedents was \$27,007; for testate decedents, \$35,160; and for intestate decedents, \$6,694. The average gross estate for all decedents was \$31,097; for testate decedents, \$41,218; for the intestate group, \$8,599. SUSSMAN, *supra* note 13, at 45-76.

<sup>53</sup>UNIFORM PROBATE CODE § 2-102(4).

<sup>54</sup>W. VA. CODE ANN. § 42-1-1(k)(1966).



If, under the Uniform Probate Code, there are no grandparents or lineal descendants of grandparents, the estate would escheat to the state,<sup>55</sup> while under the present West Virginia law the next of kin are traced through the great-grandparents to the nearest lineal ancestor or his descendants regardless of remoteness.

The limitation on inheritance by remote collateral relatives found in the Uniform Code has considerable merit. In a mobile and urban society, known family relationships rarely extend beyond the grandparents and their descendants.<sup>56</sup> Therefore, to allow more remote relatives to inherit increases the administrative problems of the probate court, for if the heirs are not readily accessible, a time consuming and expensive search must be made for them with no assurance of finding any or all of the rightful heirs. Typically, in these cases, administrative expenses far outweigh the share these distant heirs receive.<sup>57</sup> Also, by allowing remote relatives to inherit, the likelihood of a will contest is increased since any potential heir has standing to contest the will, thus increasing the risk of delay and added expense in settling the estate.<sup>58</sup>

The Uniform Code provides that issue of an equal degree of kinship to the decedent take equally while others take *per stirpes*.<sup>59</sup> If the decedent were survived by three children, for example, each would take a one-third share; if, however, one of these children had predeceased the decedent, leaving in turn three children (grandchildren of the decedent), the two children who survive the decedent would each receive their one-third as before and the three children of the predeceased child would share their parent's one-third, or each receive a one-ninth share. This would be in accord with West Virginia law.<sup>60</sup> The Uniform Code does vary from West Virginia law with respect to its treatment of half-blood relatives. Under the Uniform Probate Code, half-bloods are treated in the same manner as wholebloods,<sup>61</sup> while under present West Virginia law half-blood relatives inherit only half the share of relatives of the whole-blood.<sup>62</sup>

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<sup>55</sup>UNIFORM PROBATE CODE § 2-105.

<sup>56</sup>SUSSMAN, *supra* note 13, at 138-42.

<sup>57</sup>*Id.* at 140-41.

<sup>58</sup>O'Connell & Eitland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 216 (1972).

<sup>59</sup>UNIFORM PROBATE CODE § 2-103(1).

<sup>60</sup>W. VA. CODE ANN. § 42-1-3 (1966).

<sup>61</sup>UNIFORM PROBATE CODE § 2-107.

<sup>62</sup>W. VA. CODE ANN. § 42-1-2 (1966).

The Uniform Probate Code requires that an heir survive a decedent for 120 hours in order to share in his estate or to be entitled to a homestead or exempt property allowance.<sup>63</sup> This provision is frequently found in wills today to allow for the common disaster situation, when two or more members of the same family are injured and die within a short time of each other.<sup>64</sup> This provision is an extension of the rationale behind the Uniform Simultaneous Death Act,<sup>65</sup> which is in effect in West Virginia.<sup>66</sup> The Act provides only a partial solution to the problem, however, since it is effective only if there is no proof that the parties died other than simultaneously.<sup>67</sup> By requiring the heir to survive the decedent by five days, the Uniform Code provision avoids multiple administration as well as reduces the likelihood that the property will pass to someone not desired by the decedent.<sup>68</sup>

With respect to adopted persons, the Uniform Probate Code is in accord with present West Virginia law. The Uniform Code provides that for purposes of inheritance by, through, or from a person, an adopted child is treated as a child<sup>69</sup> of the adopting parents and not of the natural parents.<sup>70</sup> The West Virginia provision is similar.<sup>71</sup> Again, this treatment of adopted children represents the modern policy as reflected by recent statutes and court decisions.<sup>72</sup>

With respect to illegitimate children, both the West Virginia statute<sup>73</sup> and the Uniform Probate Code<sup>74</sup> provide that they may inherit from and through their mother. Both statutes also provide that the child is legitimized by the marriage of the natural parents,<sup>75</sup> and this is so even though the marriage be void.<sup>76</sup> Neither

<sup>63</sup>UNIFORM PROBATE CODE § 2-104.

<sup>64</sup>*Id.* § 2-104, Comment.

<sup>65</sup>*Id.* Article II, Part 1, General Comment.

<sup>66</sup>W. VA. CODE ANN. §§ 42-5-1 to -10 (1966).

<sup>67</sup>*Id.* § 42-5-1.

<sup>68</sup>UNIFORM PROBATE CODE § 2-104, Comment.

<sup>69</sup>"Child" includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendent. UNIFORM PROBATE CODE § 1-201(3).

<sup>70</sup>*Id.* § 2-109(1).

<sup>71</sup>W. VA. CODE ANN. § 48-4-5 (1966).

<sup>72</sup>UNIFORM PROBATE CODE, Article II, Part 1, General Comment.

<sup>73</sup>W. VA. CODE ANN. § 42-1-5 (1966).

<sup>74</sup>UNIFORM PROBATE CODE § 2-109(2).

<sup>75</sup>*Id.* § 2-109(2); W. VA. CODE ANN. § 42-1-6 (1966).

<sup>76</sup>UNIFORM PROBATE CODE § 2-109(2)(i); W. VA. CODE ANN. § 42-1-7 (1966).

requires acknowledgement of the child by the father, which leaves unresolved the situation when a man marries the mother of an illegitimate and fails to acknowledge the child as his own, but his wife claims that the child is his. The West Virginia solution does not require recognition of the child by the father as an essential element of the legitimation<sup>77</sup> but places the burden of proving that the husband is the natural parent on the child.<sup>78</sup> The Uniform Code is silent in this respect, but presumably the procedure for determining the identity of the natural father in such a case would be the same.

The Uniform Probate Code provides a second alternative method for establishing paternity that is not found in the West Virginia statutes. Under the Uniform Code, the child may be legitimized without the marriage of the natural parents by an adjudication either before the death of the natural father or after his death, if paternity can be established by clear and convincing proof.<sup>79</sup> If paternity is established under the adjudication procedure, neither the father nor his relatives qualify to inherit from or through the child unless the father has recognized the child as his and has not refused to support it.<sup>80</sup> The purpose of this provision is to encourage the natural father to acknowledge and support his children; if he fails to do so, it seems inequitable to allow him to share in the child's estate.<sup>81</sup>

West Virginia and the Uniform Probate Code both recognize the common law doctrine of advancements, although there is considerable difference in the coverage and detail of the two statutes. Under the West Virginia statute,<sup>82</sup> the doctrine is applied in cases of partial as well as complete intestacy,<sup>83</sup> while the Uniform Code does not apply the doctrine if there is only partial intestacy.<sup>84</sup> Both statutes apply the doctrine to a broader class of donees than do the majority of states.<sup>85</sup> West Virginia applies it to "any descendant or collateral relative," while the Uniform Code applies it to any

<sup>77</sup>W. VA. CODE ANN. § 42-1-6, Editor's note (1966).

<sup>78</sup>Farley v. Farley, 136 W. Va. 598, 68 S.E.2d 353 (1951).

<sup>79</sup>UNIFORM PROBATE CODE § 2-109(2)(ii).

<sup>80</sup>*Id.*

<sup>81</sup>O'Connell & Effland, *supra* note 58, at 221.

<sup>82</sup>W. VA. CODE ANN. § 42-4-1 (1966).

<sup>83</sup>Payne v. Payne, 128 Va. 33, 104 S.E. 712 (1920).

<sup>84</sup>UNIFORM PROBATE CODE § 2-110.

<sup>85</sup>T. ATKINSON, *supra* note 26, at 722. The majority of states apply the doctrine of advancements to children or their descendants only and do not apply it to collateral heirs.

“heir.” Under the Uniform Code an “heir” includes a surviving spouse<sup>86</sup> who therefore, presumably, can be an advancee.<sup>87</sup> The results of this situation are not definitive under the West Virginia provision.<sup>88</sup>

The Code also limits the application of the doctrine to those cases where there is a contemporaneous writing by the decedent stating that the gift is intended to be an advancement, or an acknowledgement in writing by the donee heir stating that the gift was intended as an advancement. The reason for this departure from the traditional and majority view<sup>89</sup> was the belief of the drafters of the Uniform Code that the reason for the doctrine was no longer present in our society. The doctrine was developed during a time when there was comparatively little wealth and an inter vivos gift of a substantial nature to one child was in all likelihood intended by the parent to be made in anticipation of that child's inheritance from the parent. Thus, a presumption arose to the effect that when there was a substantial gift to a child, the parent intended it to be made in anticipation of inheritance; in order to bring about equality between the children, the advanced child had to account for the gift before any additional participation in the estate was allowed. Understandably, this reason is no longer felt to be valid in our affluent society. Today, most inter vivos gifts are intended to be absolute gifts as distinguished from advancements,<sup>90</sup> or, alternatively, are a part of an assiduously prepared estate plan.<sup>91</sup> Since the original basis for the doctrine is no longer

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<sup>86</sup>UNIFORM PROBATE CODE § 1-201(17).

<sup>87</sup>See MODEL PROBATE CODE § 29 (L. Simes ed. 1946); ATKINSON, *supra* note 26, at 722.

<sup>88</sup>It is not clear whether the doctrine is applied to a surviving spouse in West Virginia. One West Virginia case, by way of dictum, seems to indicate it is not by stating that where the purchase price of property is paid by the husband and the conveyance is made to the wife, a presumption of a gift arises, while if a parent pays the purchase price and the conveyance is made in the name of the child, a presumption of an advancement arises, thus making a distinction between a gift to a spouse or advancement to a child. *Deck v. Tabler*, 41 W. Va. 332, 23 S.E. 721 (1895). However, in a note to this case in 56 Am. St. R. 837, 843, the editors state that the case stands for the proposition that “Where a person making a purchase of land in the name of another and paying the consideration himself is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but *it will be regarded prima facie as an advancement for the benefit of the nominal purchaser.*” (Emphasis added). See also Wright, *The Doctrine of Advancements*, 63 W. VA. L. REV. 229 (1961).

<sup>89</sup>See ATKINSON, *supra* note 26, at 716 n.3.

<sup>90</sup>*Id.* at 718.

<sup>91</sup>UNIFORM PROBATE CODE § 2-110, Comment.

valid there is little reason to follow it today other than from a "blind imitation of the past."<sup>92</sup> Accordingly, the Uniform Probate Code has limited the advancement doctrine to those situations where the donor's intent is actually shown either through a contemporaneous writing by the donor or an acknowledgement by the donee. In requiring a writing, the Code has reduced many of the uncertainties of proof by parol evidence that have always existed in most determinations of whether or not an advancement was intended.

An additional issue, the Code treatment of which differs from present West Virginia law, is whether or not an advancement to a predeceased child of an intestate is to be charged against the share that the predeceased child's children will receive by representation. The West Virginia court has held that the children of the predeceased child are barred to the same extent their parent would be barred.<sup>93</sup> The Uniform Probate Code has taken the opposite position, holding that an advancement to the parent is not to be taken into account in computing the share of the recipient's descendants unless required by a written declaration of the decedent or an acknowledgement by the predeceased recipient.

Analogous to the problems of representation in advancements are those of debts owed to the decedent by persons who are also his heirs. The weight of authority requires that the debt be deducted from the heirs' share of the estate.<sup>94</sup> Both West Virginia and the Uniform Probate Code have adopted this common law doctrine of equitable set-off.<sup>95</sup> The Uniform Code also follows the majority view<sup>96</sup> in refusing to charge the debt against the intestate share of anyone except the debtor. If the debtor does not survive the intestate decedent, then the debt is not taken into account in computing the share of the debtor's representatives.<sup>97</sup> The question has not been directly decided by the West Virginia court, but it appears

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<sup>92</sup>"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *O. W. Holmes, The Path of the Law*, in *COLLECTED LEGAL PAPERS* 187 (1920).

<sup>93</sup>*Coffman v. Coffman*, 41 W. Va. 8, 23 S.E. 523 (1895). See also *Neil v. Flynn Lumber Co.*, 82 W. Va. 24, 95 S.E. 523 (1918); *Pritchard v. Pritchard*, 76 W. Va. 91, 85 S.E. 29 (1915).

<sup>94</sup>ATKINSON, *supra* note 26, at 787.

<sup>95</sup>*In re Boggs' Estate*, 135 W. Va. 288, 63 S.E.2d 497 (1951).

<sup>96</sup>ATKINSON, *supra* note 26, at 790.

<sup>97</sup>UNIFORM PROBATE CODE § 2-111.

that West Virginia would take a contrary position and require the representatives of the deceased child to account for the debt in computing their share of the estate.<sup>98</sup>

The Uniform Probate Code would make a major change in present West Virginia law<sup>99</sup> in that the common law estates of dower and curtesy and their statutory counterparts are abolished.<sup>100</sup> The protection these estates were originally intended to provide is better provided today by other provisions in the Uniform Code.<sup>101</sup> The concept of dower and curtesy developed in an agrarian society in which the principal form of wealth was land and the main source of income was the rents and profits from land. Historically, dower provided the widow the support her deceased husband had been obligated to provide during his lifetime. Curtesy allowed the widower to continue the use of his wife's lands after her death as he had enjoyed during her lifetime. Today, however, when so large a portion of the decedent's wealth is likely to be in the form of personal property rather than real estate, dower and curtesy no longer make as adequate a provision for the surviving spouse as was originally intended.<sup>102</sup> For this reason, most states have enacted legislation allowing the surviving spouse either the additional or alternative right to elect to take a designated share of the deceased spouse's estate.<sup>103</sup> The most modern legislation has abolished dower altogether and, in its place, provided a share of the deceased spouse's estate which is secure to the surviving spouse against testamentary disposition.<sup>104</sup>

### *Part 2. Elective Share of Surviving Spouse.*

Most states have preserved for the surviving spouse certain rights in the property of the deceased spouse that cannot be defeated by testamentary transfers. The official comment to the Uni-

<sup>98</sup>*In re Boggs' Estate*, 135 W. Va. at 309, 63 S.E.2d at 510: "An indebtedness against an estate, as distinguished from an advancement against the estate, is decidedly different. An indebtedness *must be paid in any event*: an advancement . . . embraces no obligation to repay the amount thereof." (Emphasis added).

<sup>99</sup>W. VA. CODE ANN. §§ 43-1-1 to -20 (1966).

<sup>100</sup>UNIFORM PROBATE CODE § 2-113.

<sup>101</sup>See notes 105 to 173 *infra* and accompanying text.

<sup>102</sup>MODEL PROBATE CODE § 31, Comment (L. Simes ed. 1946).

<sup>103</sup>*E.g.*, W. VA. CODE ANN. § 42-3-1 (1966).

<sup>104</sup>ATKINSON, *supra* note 26, at 107; Johnson, *The Abolition of Dower in Virginia: The Uniform Probate Code as an Alternative to Proposed Legislation*, 7 U. RICH. L. REV. 99 (1972); Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969).

form Probate Code states that Part 2 of Article II is "designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a 'fair share' of the decedent's estate."<sup>105</sup> The drafters of the Code recognized that Part 2 was likely to generate controversy.<sup>106</sup> They also recognized that many states still have statutes that protect the surviving spouse by providing the power to elect to take a given portion of the decedent's probate estate in lieu of the provision provided in the will. However, these statutes provide little protection against the various will substitutes that allow a property owner to transfer ownership at his death without using a will.<sup>107</sup>

To protect the property interests of a surviving spouse, some states have applied a fraud test and held ineffective the inter vivos transfer made after marriage if it was intended to deprive the surviving spouse of his or her forced share. Perhaps more states have rejected this test and have made the determination of whether the transfer is valid or not on the basis of whether it was real or illusory.<sup>108</sup> So long as the transfers are not found to be "illusory,"<sup>109</sup> most states have held them valid, even though they may have been made with the express purpose of defeating the forced share of the surviving spouse.<sup>110</sup> This issue does not seem to have been decided by the West Virginia court. The Virginia courts, however, are in accord with the "illusory" test.<sup>111</sup> In any case, the present state of the law in this area is still unresolved. Courts have been searching for a solution which will allow a property owner to dispose of his property to others in good faith and at the same time provide the surviving spouse some protection against inter vivos transfers intended to defeat the right to the forced share.<sup>112</sup>

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<sup>105</sup>UNIFORM PROBATE CODE, Article II, Part 2, General Comment.

<sup>106</sup>"Almost every feature of the system described herein is or may be controversial." *Id.*

<sup>107</sup>*Id.*

<sup>108</sup>ATKINSON, *supra* note 26, at 112.

<sup>109</sup>Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

<sup>110</sup>*In re Montgomery's Estate*, 2 Ill. App. 3d 821, 277 N.E.2d 739 (1972); *Kempf v. Kempf*, 288 Minn. 244, 177 N.W.2d 40, *aff'd* 179 N.W.2d 715 (1970); *In re Center's Will*, 61 N.Y. Misc. 2d. 193, 304 N.Y.S.2d 944 (1969); *Heller v. Heller*, 7 N.C. App. 120, 171 S.E.2d 335 (1969); *Smyth v. Cleveland Trust Co.*, 172 Ohio St. 489, 179 N.E.2d 60 (1961); *Irvin v. Thompson*, 464 P.2d 775 *aff'd* 500 P.2d 283 (Okla. 1972).

<sup>111</sup>*Freed v. Judith Realty & Farm Prods. Corp.*, 201 Va. 791, 113 S.E.2d 850 (1960); *Hall v. Hall*, 109 Va. 117, 63 S.E. 420 (1909).

<sup>112</sup>ATKINSON, *supra* note 26, at 113-17.

The Uniform Probate Code's approach to this problem, like that of other modern legislative solutions,<sup>113</sup> is one of extending the elective share of a surviving spouse to certain non-testamentary transfers.<sup>114</sup> The elective share under the Uniform Code is one-third of the augmented estate if the decedent is domiciled within the state;<sup>115</sup> if not, then the elective share in property within the state is determined by the law of the decedent's domicile.<sup>116</sup> While the amount of one-third is the same as the present West Virginia statute,<sup>117</sup> the augmented estate includes both real and personal property. Under the West Virginia statute, the surviving spouse receives at most a dower interest in real property and a one-third interest in personalty.<sup>118</sup>

The augmented estate concept, from which the surviving spouse receives a one-third share, consists of three elements: (1) The net distributable estate;<sup>119</sup> to which is added (2) the value of property gratuitously transferred to third persons during the marriage by the decedent without the consent of the surviving spouse, by a conveyance which is in effect a will substitute;<sup>120</sup> and (3)

<sup>113</sup>N.Y. EST., POWERS & TRUSTS LAW § 5-1.1 (McKinney 1967); PA. STAT. ANN. tit. 20, § 2105 (1972).

<sup>114</sup>UNIFORM PROBATE CODE § 2-202.

<sup>115</sup>*Id.* § 2-201(a).

<sup>116</sup>*Id.* § 2-201(b).

<sup>117</sup>W. VA. CODE ANN. § 42-3-1 (1966).

<sup>118</sup>*Jacobs v. Jacobs*, 100 W. Va. 585, 131 S.E. 449 (1926); *Sperry v. Swiger*, 54 W. Va. 283, 46 S.E. 125 (1903); *Cunningham v. Cunningham*, 30 W. Va. 599, 5 S.E. 139 (1888).

<sup>119</sup>"[T]he estate reduced by funeral and administration expenses, homestead allowance, family allowances, and exemptions and enforceable claims . . . ." UNIFORM PROBATE CODE § 2-202.

<sup>120</sup> (i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.

UNIFORM PROBATE CODE § 2-202(1). Only transfers made during marriage are included. Thus, a decedent may provide for issue of a prior marriage by life insurance or a revocable inter vivos trust without fear of these provisions being upset by a



property owned by the surviving spouse that was derived from the decedent.<sup>121</sup> As a condition of making an election the surviving spouse must account for his or her property and prove the extent that it was acquired from a source other than the decedent.<sup>122</sup> Note, however, that the inclusion of this third element, *i.e.*, the surviving spouse's property derived from the decedent, operates to *reduce* rather than increase the elective share of the surviving spouse. If, for example, the decedent made a non-testamentary transfer or non-probate arrangement for his spouse, the spouse must account for that property before she or he can share any further in the estate. This is consistent with the two-fold purpose of the augmented estate concept: (1) Preventing the property owner from making non-testamentary arrangements for the purpose of deliberately defeating the surviving spouse's right to a forced share; and (2) preventing the surviving spouse from electing a share of the probate estate when the spouse has already received a "fair share" of the total assets of the decedent.<sup>123</sup> Thus the augmented estate concept is like a two-edged sword — it cuts both ways, first, to prevent the unappreciative spouse from completely disinheriting the surviving spouse, and secondly, to prevent an avaricious surviving spouse from taking more than the "fair share" intended by the decedent.

The drafters of the Uniform Code realized that the augmented estate concept is relatively complex and they anticipate litigation will be required, at least initially, in those cases where the elective share right is asserted.<sup>124</sup> The proposed system should not, however, complicate administration in the majority of cases, since the surviving spouse, rather than the personal representative or the court, has the responsibility of asserting an election<sup>125</sup> as well as showing that she or he is entitled to receive more than they have

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subsequent marriage. *Id.* § 2-202, Comment.

<sup>121</sup>Including, but not limited to, beneficial interest in a trust, the exercise of a power of appointment, life insurance proceeds, inter vivos gifts, value of amounts payable after decedent's death under a pension or retirement plan, and joint tenancy assets. *Id.* § 2-202(2). Life or accident insurance, joint annuities and pensions payable to persons other than the surviving spouse are specifically exempted from the augmented estate by subsection (2). This section also provides that transfers may be excluded if made with the written consent or joinder of the surviving spouse. *Id.* § 2-202(2). Federal Social Security benefits are also excluded. *Id.* § 2-202(2)(i).

<sup>122</sup>*Id.* § 2-202(2)(iii).

<sup>123</sup>*Id.* § 2-202, Comment.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.* § 2-203.

already received.<sup>126</sup> Furthermore, the time limits under the Code require that the election be made within six months after the first<sup>127</sup> publication of notice to the creditors.<sup>128</sup>

Under the Uniform Code the surviving spouse's right to election is freely releasable either prior to or after marriage, so long as there is a "fair" disclosure by the other party. This release may also include the spouse's rights to the homestead allowance, exempt property and the family allowance.<sup>129</sup> This provision seems to be in keeping with present West Virginia law,<sup>130</sup> since the West Virginia courts have held that both antenuptial<sup>131</sup> and postnuptial<sup>132</sup> marriage settlements may be upheld to bar the surviving spouse from further participation in the estate of the decedent or in dower, as long as the intent to do so clearly appears or is implied from the language of the settlement.<sup>133</sup>

### *Part 3. Spouse and Children Unprovided for in Wills.*

The Uniform Probate Code makes the same provision for the unintentionally<sup>134</sup> omitted spouse who married the testator *after* the will was executed as it does for the pretermitted child. Both shall receive the share they would have taken had the testator died intestate. This provision appears appropriate considering the Code's abolition of the doctrine of revocation of wills by subsequent marriage of the maker. The Code makes no special provision for the spouse who was married to the testator prior to the execution of the will. In that case, the omitted spouse can only assert the elective share rights. The purpose of this section is to reduce

<sup>126</sup>*Id.* § 2-202(2)(iii).

<sup>127</sup>Section 2-205(a) (line 4) should read, "within six months after the *first* publication of notice to creditors." This will be printed in future editions of the Code by West Publishing Co. 3 UNIFORM PROBATE CODE NOTES 5 (Dec. 1972).

<sup>128</sup>UNIFORM PROBATE CODE § 2-205. W. VA. CODE ANN. § 42-3-1 (1966) allows the surviving spouse eight months from the admission of the will to probate to renounce.

<sup>129</sup>UNIFORM PROBATE CODE § 2-204.

<sup>130</sup>W. VA. CODE ANN. §§ 48-3-7 to -10, -15. (1966).

<sup>131</sup>*Williamson v. First Nat'l Bank*, 111 W. Va. 720, 164 S.E. 777 (1932); *Bramer v. Bramer*, 84 W. Va. 168, 99 S.E. 329 (1919).

<sup>132</sup>*Chambers v. Pierce*, 94 W. Va. 766, 120 S.E. 912 (1924).

<sup>133</sup>*Welsh v. Welsh*, 136 W. Va. 914, 69 S.E.2d 34 (1952).

<sup>134</sup>"[If] it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence," then this provision shall not apply. UNIFORM PROBATE CODE § 2-301(a).

the number of instances in which a spouse will claim an elective share<sup>135</sup> to those cases where the surviving spouse was married to the decedent prior to the execution of the will. It should be noted that the intestate share the surviving spouse would receive under this section will be greater than the one-third taken under the elective share.<sup>136</sup> This will, of course, encourage the use of this section rather than the elective share.

Under present West Virginia law,<sup>137</sup> the share of the surviving spouse is the same regardless of whether the share given is renounced or no provision is made.<sup>138</sup> In both cases the surviving spouse receives the share of the decedent's estate that he or she would have taken if the decedent had died intestate leaving children.

The Uniform Code provides protection for the pretermitted child born or adopted after the execution of the will, unless: (1) It appears from the will that the omission was intentional; (2) the testator devised the bulk of his estate to the other parent of the omitted child; or (3) the child is provided for by a non-testamentary transfer intended to be in lieu of a provision in the will.<sup>139</sup> If the omitted child qualifies under this provision, he receives the share of the estate he would have received had the testator died intestate. Under the current West Virginia statutes, the pretermitted or posthumous child also takes the share of the estate he would have been entitled to had the testator died intestate,<sup>140</sup> and this is true even though the testator left other children who were alive at the time the will was executed and who were not provided for in the will. Those children do not share in the estate, since it is presumed that the testator omitted them intentionally.<sup>141</sup> Thus, the elder children of the testator who were in existence when the will was executed would not share in the estate, while the younger ones, born after the execution of the will, would share. This is so even if the testator left the bulk or all of his estate to his surviving spouse, the other parent of the pretermitted child—the surviving parent must contribute to make up the share

<sup>135</sup>*Id.* § 2-301, Comment.

<sup>136</sup>*See Id.* §§ 2-102, -201(a), -202.

<sup>137</sup>W. VA. CODE ANN. § 42-3-1 (1966).

<sup>138</sup>Renunciation is not necessary under the W. Va. statute where no provision is made in the will for the surviving spouse. *Id.*

<sup>139</sup>UNIFORM PROBATE CODE § 2-302(a).

<sup>140</sup>W. VA. CODE ANN. §§ 41-4-1, -2 (1966).

<sup>141</sup>*Ramsey v. Saunders*, 114 W. Va. 590, 172 S.E. 798 (1934).

of the omitted child. This would not be the case under the Uniform Probate Code, where the omitted child is not allowed to share in the estate if the bulk of the estate is devised to that child's parent—decedent's surviving spouse. If, however, the testator makes a non-testamentary transfer to a pretermitted child with the intent that the settlement be in lieu of a testamentary provision, then this settlement would preclude the child from any further share of the parent's estate under the West Virginia statute.<sup>142</sup> This is in line with the West Virginia position that receipt by any child of a decedent of an inter vivos portion (or advancement) of his parent's estate as his full share precludes that child, his children, or their grantees, from any further participation in the remainder of the parent's estate.<sup>143</sup>

The West Virginia statute does not make it clear, as does the Code, that after-adopted as well as after-born children are also included. However, when the pretermitted child statute is read in conjunction with the West Virginia adoption statute,<sup>144</sup> it would seem that adopted children should be treated the same as the natural born children of the testator.<sup>145</sup> The Code also provides for that rare case in which the testator fails to provide for a child in existence at the time the will was executed because he believes that the child is dead. Such a mistakenly omitted child receives an intestate share.<sup>146</sup> West Virginia currently makes no provision for this situation.

#### *Part 4. Exempt Property and Allowances.*

The provisions of Part 4 are intended to protect the family of the decedent from loss of family assets to creditors of the decedent or from disinheritance by the decedent.<sup>147</sup> Under these provisions,

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<sup>142</sup>"[S]uch after-born child . . . if not provided for by any settlement, and neither provided for nor expressly excluded by the will, but only pretermitted, shall succeed to such portion of the testator's estate as he would have been entitled to if the testator had died intestate . . ." W. VA. CODE ANN. § 41-4-2 (1966) (emphasis added).

<sup>143</sup>Neil v. Flynn Lumber Co., 82 W. Va. 24, 95 S.E. 523 (1918); Coffman v. Coffman, 41 W. Va. 8, 23 S.E. 523 (1895).

<sup>144</sup>W. VA. CODE ANN. § 48-4-5 (1966).

<sup>145</sup>See 70 W. VA. L. REV. 132 (1967).

<sup>146</sup>UNIFORM PROBATE CODE § 2-302(a).

<sup>147</sup>"This part describes certain rights and values to which a surviving spouse and certain children of a deceased *domiciliary* are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will." UNIFORM PROBATE CODE, Article II, Part 4, General Comment. See also Wellman, *supra* note 1, at 478.

the first \$14,500<sup>148</sup> of the probate assets are preserved for the immediate family<sup>149</sup> of the decedent against all unsecured creditors and beneficiaries of the will. This figure represents the sum of the Code's five thousand dollar homestead exemption, three thousand, five hundred dollar personal property exemption, and six thousand dollar family allowance. The Uniform Code limits these provisions to the families of domiciliary decedents,<sup>150</sup> as do the West Virginia statutes.<sup>151</sup> The Code provides for the homestead allowance in set dollar terms, although distribution may be in property rather than money.<sup>152</sup> The five thousand dollar figure was chosen because of the desirability of having a certain level below which the administration of small estates may be foregone.<sup>153</sup> The five thousand dollar suggested figure is realistic in relation to present day property values and corresponds to the five thousand dollar homestead exemption recently added to the West Virginia constitution.<sup>154</sup> The homestead allowance under the Uniform Code is exempt from all debts of the decedent,<sup>155</sup> making it equally valuable whether the family property is held free of debts, is subject to a mortgage or is rental property. This would not be true under the present West Virginia statute,<sup>156</sup> which provides that the homestead is subject to purchase money debts, debts for permanent improvements and taxes, as well as debts contracted before the declaration of the homestead exemption was recorded.<sup>157</sup>

The Uniform Code provides that any surviving spouse domiciled within the state is entitled to the homestead exemption. The

<sup>148</sup>This figure assumes that the personal representative grants the surviving spouse the full amount of the family allowance which may be given without approval of the court. See UNIFORM PROBATE CODE § 2-404.

<sup>149</sup>Surviving spouse or minor and dependent children for homestead allowance under § 2-401; Surviving spouse or children for exempt property under § 2-402; Surviving spouse and minor and dependent children for the family allowance under § 2-403.

<sup>150</sup>UNIFORM PROBATE CODE, Article II, Part 4, General Comment.

<sup>151</sup>W. VA. CODE ANN. §§ 38-8-1, 38-9-1 (1966).

<sup>152</sup>UNIFORM PROBATE CODE § 3-906(a)(2).

<sup>153</sup>*Id.* § 2-401, Comment.

<sup>154</sup>W. VA. CONST. art VI, § 48. This section of the constitution was recently amended to increase the homestead exemption from \$1000 to \$5000 and the personal property exemption from \$200 to \$1000. At this writing, the West Virginia Legislature has not acted to implement these new figures through statutory changes. Presumably this will be done during the 1974 session of the Legislature.

<sup>155</sup>Except security interests on the property itself. See UNIFORM PROBATE CODE §§ 3-803, -809, -814.

<sup>156</sup>W. VA. CODE ANN. § 38-9-3 (1966).

<sup>157</sup>*Reinhardt v. Reinhardt*, 21 W. Va. 76 (1882); *Speidel v. Schlosser*, 13 W. Va. 686 (1879); *Linsey v. McGannon*, 9 W. Va. 154 (1876).

West Virginia constitution makes it mandatory upon the legislature to provide a homestead exemption for three classes of persons: (1) Husbands, (2) parents, or (3) infant children of deceased parents.<sup>158</sup> The right to declare a homestead exemption exists first in the husband while the marital relation exists; second, in either parent with whom the minor children reside in those cases where the marital relation has ceased to exist; and, third, in the minor children if both parents are dead.

The Uniform Code also provides an optional section for states that have a constitutional homestead provision. This alternative provision provides that "[t]he value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution."<sup>159</sup> The purpose of the alternative provision is to provide for those situations where the value of the spouse's constitutional right of homestead is less than the value of the family residence and only a termiable life interest is to be enjoyed in common with minor children.<sup>160</sup> Since the West Virginia provision neither limits the homestead interest to a life estate, nor sets an upper limit on the amount of the exemption,<sup>161</sup> this alternative provision does not seem necessary for West Virginia.

Both the Code<sup>162</sup> and the West Virginia statute<sup>163</sup> use a set dollar figure for determining the exempt property allowance rather than enumerating specific property. However, there is a great disparity between the thirty-five hundred dollars provided by the Uniform Code and the one thousand dollars provided in West Virginia. Under the Uniform Code, the exempt property provision is available in those cases where the decedent is survived by only adult children.<sup>164</sup> The West Virginia statutory provision limits this right to the surviving spouse or minor children.<sup>165</sup> Under the Code, the exempt property takes priority over other claims against the estate except the homestead and family allowances and security

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<sup>158</sup>W. VA. CONST. art. VI, § 48.

<sup>159</sup>UNIFORM PROBATE CODE § 2-401A.

<sup>160</sup>*Id.* § 2-401A, Comment.

<sup>161</sup>*In re White*, 185 F. Supp. 609, 614 (N.D.W. Va. 1960).

<sup>162</sup>UNIFORM PROBATE CODE § 2-402.

<sup>163</sup>W. VA. CODE ANN. §§ 38-8-1, -10 (1966).

<sup>164</sup>UNIFORM PROBATE CODE § 2-402, Comment.

<sup>165</sup>W. VA. CODE ANN. § 38-8-10 (1966).

interests in the property.<sup>166</sup> In addition to subjecting the exempt property to security interests, the West Virginia provision also provides for tax liabilities on the exempt realty.<sup>167</sup>

West Virginia has no family protection statute comparable to the family allowance provision of the Uniform Code.<sup>168</sup> Under the Code, the surviving spouse and minor children, as well as children the decedent was in fact supporting, are entitled to a reasonable allowance, not to exceed six thousand dollars per year or five hundred dollars per month.<sup>169</sup> This allowance is taken from the estate for a period of no longer than one year while the estate is being administered. The present West Virginia provisions for dower<sup>170</sup> would come closest to providing the kind of family protection intended by the family allowance provision of the Uniform Code. In West Virginia the surviving spouse is entitled to the use of the family residence without charge until dower is assigned,<sup>171</sup> and if there are also minor children the surviving spouse and minors have the right to occupy the family residence until the youngest child reaches the age of twenty-one.<sup>172</sup> Additionally, the decedent's family is entitled to consume certain commodities on hand at the time of the decedent's death.<sup>173</sup>

#### Part 5. Wills

The basic intent of Part 5 is to validate the will whenever possible.<sup>174</sup> To this end, the formalities required in both the writing and attesting of a will are strictly minimized. The Code has also accommodated those testators who choose to prepare a will without legal advice by expanding the types of writings that may be effective as a will. Thus, holographic wills are authorized,<sup>175</sup> as well as a broader application of the doctrine of incorporation by reference.<sup>176</sup>

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<sup>166</sup>See UNIFORM PROBATE CODE §§ 3-803, -809,-814.

<sup>167</sup>W. VA. CODE ANN. § 38-8-11 (1966).

<sup>168</sup>UNIFORM PROBATE CODE § 2-403.

<sup>169</sup>*Id.* § 2-404. The size of the allowance is determined by the personal representative. Allowances larger than the amount prescribed by this section must be approved by the court.

<sup>170</sup>W. VA. CODE ANN. §§ 43-1-1, -10,-11,-12,-20 (1966).

<sup>171</sup>*Id.* § 43-1-10; *Amiss v. Hiteshew*, 106 W. Va. 703, 147 S.E. 26 (1929).

<sup>172</sup>W. VA. CODE ANN. § 43-1-11 (1966).

<sup>173</sup>*Id.* § 44-1-17.

<sup>174</sup>UNIFORM PROBATE CODE, Article II, Part 5, General Comment.

<sup>175</sup>*Id.* § 2-503.

<sup>176</sup>*Id.* § 2-513.

## UNIFORM PROBATE CODE

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Both the West Virginia statutes<sup>177</sup> and the Uniform Probate Code<sup>178</sup> require the testator be of sound mind and eighteen years of age to make a will. Both statutes also allow holographic wills.<sup>179</sup> Under the Uniform Code only the signatures and material provisions need be in the testator's handwriting, while the West Virginia statute requires the will to be wholly in the handwriting of the testator.<sup>180</sup> Under the Uniform Code the witnesses must either witness the signing of the will, or an acknowledgment by the testator to either his signature or to the instrument as his will.<sup>181</sup> This differs from present West Virginia law which requires the testator to acknowledge the will if the witnesses were not present at the time the document was signed.<sup>182</sup> The Code would also relax the present West Virginia requirement of the witnesses being present at the same time when the testator either signs or acknowledges his will and further that the witnesses be in each other's presence when they subscribe their signatures to the will.<sup>183</sup> Under the Uniform Code there is no requirement that the witnesses sign in the presence of the testator or each other.<sup>184</sup>

Both West Virginia<sup>185</sup> and the Uniform Code<sup>186</sup> provide procedures for a self-proved will. Under both procedures an affidavit is taken, before an officer authorized to administer oaths, stating the facts that would be required of the witnesses to establish the will in court by their testimony.<sup>187</sup> The West Virginia statute does not permit the use of these affidavits in the case of a will contest.

<sup>177</sup>W. VA. CODE ANN. §§ 41-1-1, -2 (1966).

<sup>178</sup>UNIFORM PROBATE CODE § 2-501.

<sup>179</sup>*Id.* § 2-503; W. VA. CODE ANN. § 41-1-3 (1966).

<sup>180</sup>While the point has never been decided in West Virginia, the Virginia courts have held that "wholly" as used in the comparable Virginia statute is not used in its "absolute, utter and rigidly uncompromising sense." *Bell v. Timmins*, 190 Va. 648, 58 S.E.2d 55 (1950). Thus it would seem that the Virginia courts would treat a document as valid even though immaterial parts such as the date or introductory wording were printed or typed. See UNIFORM PROBATE CODE § 2-503, Comment.

<sup>181</sup>UNIFORM PROBATE CODE § 2-502, Comment.

<sup>182</sup>Rees, *American Wills Statutes: I*, 46 VA. L. REV. 613, 620 (1960).

<sup>183</sup>W. VA. CODE ANN. § 41-1-3 (1966).

<sup>184</sup>UNIFORM PROBATE CODE § 2-502, Comment.

<sup>185</sup>W. VA. CODE ANN. § 41-5-15 (1966).

<sup>186</sup>UNIFORM PROBATE CODE § 2-504.

<sup>187</sup>Specifically, the witnesses' affidavits must show that the testator signed and executed the document as his last will and that he did so freely or directed another to sign for him, that his execution was a free and voluntary act, that each witness, in the presence and hearing of the testator, signed the will as witness, and that to the best of their knowledge the testator was eighteen or more years old, of sound mind and under no restraints or undue influence. See *Id.* § 2-504.



Under the Uniform Code, the self-proved will may be contested, except in regard to signature requirements, in the same manner as a will not self-proved.<sup>188</sup>

The Uniform Code provides that anyone who is generally competent to be a witness may witness a will and that no will or provision thereof is invalid because it was attested to by an interested witness.<sup>189</sup> Under this provision, interest no longer disqualifies a person to be a witness as it did at common law,<sup>190</sup> nor does it require the forfeiture of the gift under the will, as was required under the Statute of George II<sup>191</sup> and the Statute of Wills.<sup>192</sup> The drafters of the Code recognized that a requirement of disinterested witnesses would not reduce the incidence of fraud or undue influence as the requirement was originally intended. Instead, they viewed the requirement as a trap for the unwary in the innocent use of a beneficiary as a witness who now will no longer be penalized by the loss of his interest.<sup>193</sup>

The test of the competency of a witness to a will in West Virginia, like the Uniform Code, is his competency to testify in court.<sup>194</sup> If, however, the witness or his or her spouse has any beneficial interest under the will, then their interest is voided by present West Virginia law in order to make them competent witnesses, unless the witness is also an heir at law. If he is also an heir then he will receive the lesser of the will benefits or the intestate share.<sup>195</sup> The West Virginia statutes do provide, however, that creditors and executors are not such interested parties as to make them incompetent to be witnesses.<sup>196</sup>

The Uniform Code provides a broad choice of law concerning the validity of the execution of a will.<sup>197</sup> If the will is valid in the state where it was executed, or the state where at the time of his death the testator is domiciled, has a residence or is a national,

<sup>188</sup>*Id.* § 2-504, Comment.

<sup>189</sup>*Id.* § 2-505.

<sup>190</sup>2 J. WIGMORE, EVIDENCE § 575 (3d ed. 1940).

<sup>191</sup>25 Geo. 2, c.6, § 1 (1752).

<sup>192</sup>7 Will. 4 & 1 Vict., c. 26, § 15 (1837).

<sup>193</sup>UNIFORM PROBATE CODE § 2-505, Comment.

<sup>194</sup>W. VA. CODE ANN. § 57-3-1 (1966); *Sperry v. Clark*, 123 W. Va. 90, 13 S.E.2d 404 (1941); *Coffman v. Hedrick*, 32 W. Va. 119, 9 S.E. 65 (1889).

<sup>195</sup>W. VA. CODE ANN. § 41-2-1 (1966). This statute is patterned after the English Wills Act of 1837, 7 Will. 4 & 1 Vict., c.26, § 15 (1837). See Rees, *American Wills Statutes: I*, *supra* note 182, at 131.

<sup>196</sup>W. VA. CODE ANN. §§ 41-2-2, -3 (1966).

<sup>197</sup>UNIFORM PROBATE CODE § 2-506.

then it is valid in any state that has adopted the Uniform Code. If this provision were now in effect in West Virginia it would operate in the following manner: If the testator were domiciled in West Virginia and executed a will in Pennsylvania, while on vacation there, in such a manner that it would be valid under Pennsylvania law but would not be valid under present West Virginia law,<sup>198</sup> the courts of West Virginia would nevertheless recognize the will as valid so long as the law of Pennsylvania permitted execution in the manner used.<sup>199</sup> West Virginia presently follows the conflict of laws rule that the validity of a will is determined with regard to personal property by the law of the testator's domicile, and with regard to realty by the laws of the jurisdiction where the realty is located; the law of the state in which the will was executed has no legal significance or effect.<sup>200</sup> This, of course, would be changed if the Uniform Probate Code were adopted.

The provisions for revocation in the West Virginia law and the Uniform Code are similar, but with some variations. Under the Uniform Code there is no provision for a writing executed with statutory formality which does nothing but revoke the will, a provision found in the West Virginia statute.<sup>201</sup> The Code does provide, as does the West Virginia statute, for a will to be revoked in whole or part by a subsequent will or codicil or by a physical act.<sup>202</sup> The drafters of the Code leave the determination to the courts of whether a subsequent will, which has no express revocation clause, will revoke a prior will either in whole or in part.<sup>203</sup>

The major difference between West Virginia law and the Uniform Code in the revocation area deals with other circumstances that revoke the will. The West Virginia court has held that "im-

<sup>198</sup>For example, under Pennsylvania law there is no express requirement of signing or subscription by the witnesses but only that the will be "proved by the oaths or affirmations of two competent witnesses." PA. STAT. ANN. tit. 20, § 2504 (1972). Thus, a typewritten will signed only by the testator and not subscribed to by the witnesses would be valid in Pennsylvania but would not presently be valid in West Virginia.

<sup>199</sup>UNIFORM PROBATE CODE § 2-506, Comment.

<sup>200</sup>*In re Briggs' Estate*, 148 W. Va. 294, 134 S.E.2d 737 (1964).

<sup>201</sup>"No will or codicil, or any part thereof, shall be revoked, unless under the preceding section [§ 41-1-6], or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed . . ." W. VA. CODE ANN. § 41-1-7 (1966) (emphasis added).

<sup>202</sup>UNIFORM PROBATE CODE § 2-507.

<sup>203</sup>*Id.* § 2-507, Comment. See *Poindexter v. Jones*, 200 Va. 372, 106 S.E.2d 144 (1958); *In re Wizenrith's Will*, 133 W. Va. 267, 55 S.E.2d 897 (1949).

plied revocation is precluded as a recognized principle by the express language of our applicable statute."<sup>204</sup> Other than the general revocation statute previously discussed, the only other statutory provision for revocation in West Virginia deals with marriage. Under the West Virginia statute,<sup>205</sup> marriage revokes the will unless the will provides otherwise or unless it exercises a power of appointment, which would not, in default of the exercise, pass to the appointee's estate. Under the Uniform Probate Code divorce or annulment revokes any provision made in the will for the former spouse unless the will provides otherwise. No other change in the domestic circumstances of the testator will operate to revoke a will.<sup>206</sup> Thus, the adoption of the Code would change West Virginia law from revocation by marriage to revocation by divorce. The purpose of revoking a will by a subsequent marriage is, of course, to protect the surviving spouse.<sup>207</sup> Under the Uniform Code this protection is provided by the omitted spouse provision<sup>208</sup> or the elective share provision.<sup>209</sup>

The law concerning the revival of revoked wills may be in some doubt in West Virginia. The West Virginia statute on revival<sup>210</sup> is patterned after the English Statute of Wills,<sup>211</sup> which provides that a revoked will can only be revived by a reexecution or by the publication of a codicil reviving it. Kentucky and Virginia also have similar provisions.<sup>212</sup> While the point has not been decided in West Virginia, Kentucky and Virginia have taken opposite positions on the moment of time at which revocation by a subsequent instrument takes effect, and, thus, when revival becomes necessary.

Kentucky is committed to the view that revocation takes place at the time of the execution of the revoking instrument,<sup>213</sup> which is also the English view.<sup>214</sup> Virginia is presently committed to the

<sup>204</sup>*Swann v. Swann*, 131 W. Va. 555, 559, 48 S.E.2d 425, 428 (1948). *See also*, 69 W. VA. L. REV. 108 (1966); 67 W. VA. L. REV. 57 (1964).

<sup>205</sup>W. VA. CODE ANN. § 41-1-6 (1966).

<sup>206</sup>UNIFORM PROBATE CODE § 2-508.

<sup>207</sup>*Id.* § 2-508, Comment.

<sup>208</sup>*Id.* § 2-301.

<sup>209</sup>*Id.* § 2-201.

<sup>210</sup>W. VA. CODE ANN. § 41-1-8 (1966).

<sup>211</sup>7 Will. 4 & 1 Vict., c.26, § 22 (1837).

<sup>212</sup>*Rees, American Wills Statutes: II*, 46 VA. L. REV. 856, 891 (1960).

<sup>213</sup>*Slaughters Adm'r v. Wyman*, 228 Ky. 226, 14 S.W.2d 777 (1929).

<sup>214</sup>*Major & Mundy v. Williams & Iles*, 7 Eng. Eccl. R. 453. *See also* ATKINSON, *supra* note 26 at 477; Barnett, *Revocation and Revival of Wills in Virginia*, 1 RICH. L. NOTES, 147, 151 (1960).

view that revocation takes place at the time the revoking instrument becomes effective, which is the death of the testator.<sup>215</sup> The difference between these two views involves a determination of when the revival statute is applicable. Under the Kentucky view the statute would be applicable anytime a subsequent will was executed and contained an express revocation clause. If the subsequent will was later revoked, the former will would not be revived without a reexecution of the former will or a codicil reviving it. Under the Virginia view, this would not be necessary since the subsequent will was ambulatory until the death of the testator, and since it does not become effective, neither does the revocation of the prior will. Thus, under the present Virginia view, revival would not be necessary to make the former will effective<sup>216</sup> since it was never revoked. This question has not been before the West Virginia court, and one can only speculate on the position it would take. The Virginia court has generally been criticized for the position it has taken.<sup>217</sup> Adoption of the Uniform Probate Code would resolve the issue in favor of the Kentucky position. Revocation of the second will would not revive the first will unless it appeared that it was the testator's intent to revive the first will or unless the first will is republished.<sup>218</sup>

The Uniform Probate Code has codified the doctrine of incorporation by reference,<sup>219</sup> a provision not found in the West Virginia statutes. In what appears to be the only West Virginia case to consider the question of incorporation, the court allowed the incorporation of certain deeds into the decedent's will for the purpose of determining the intent of the testator in his dispositive scheme.<sup>220</sup> This case, along with the fact that the Virginia court has clearly recognized the doctrine,<sup>221</sup> leads to the conclusion that the West Virginia court would adhere to it should the question be

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<sup>215</sup>*Timberlake v. State-Planters Bank*, 201 Va. 950, 115 S.E.2d 39 (1960); Note, 10 KAN. L. REV. 106 (1961); 37 N.D.L. REV. 128 (1961); 18 WASH & LEE L. REV. 166 (1961); 63 W. VA. L. REV. 86 (1960).

<sup>216</sup>This view presumes that the former will was not revoked by a physical act and was retained by the testator.

<sup>217</sup>See Barnett, *Revocation and Revival of Wills in Virginia*, 1 RICH. L. NOTES 147 (1960); Note, 67 W. VA. L. REV. 57 (1964).

<sup>218</sup>UNIFORM PROBATE CODE § 2-509.

<sup>219</sup>*Id.* § 2-510. "Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification."

<sup>220</sup>*Wible v. Ashcraft*, 116 W. Va. 54, 178 S.E. 516 (1935).

<sup>221</sup>*Lawless v. Lawless*, 187 Va. 511, 47 S.E.2d 413 (1948); *Triplett's Ex'r v. Triplett*, 161 Va. 906, 172 S.E. 162 (1934).

clearly presented. Both West Virginia and the Code have adopted the Uniform Testamentary Additions to Trusts Act.<sup>222</sup>

The Uniform Code also provides that a will may dispose of property by reference to events that have independent legal significance apart from their effect upon the will, whether the event occurs before or after the execution of the will or the testator's death.<sup>223</sup> For example, a bequest "to those who shall take care of me during my last days, whoever they may be,"<sup>224</sup> or "to all servants in my employ at the time of my death fifty dollars each"<sup>225</sup> would be valid under this doctrine, even though it requires looking outside the will to determine the beneficiary referred to therein. Furthermore, the fact that the testator is also involved in the future act of selecting the property or person to receive the bequest does not necessarily invalidate the gift. It has been held that a bequest "to the woman I marry" or of "the automobile I own at my death" is valid even though the testator is involved in the nontestamentary act. The fact that these acts have significance apart from their testamentary effect allows the reference to them to be honored.<sup>226</sup> While there are no West Virginia cases on point, the Virginia cases referred to above indicate an acceptance of the doctrine.

As a part of its "broader policy of effectuating a testator's intent and of relaxing formalities of execution,"<sup>227</sup> the Code allows a testator to refer in his will to a separate written statement or list which disposes of tangible personal property. The provision excludes money, evidence of indebtedness, documents of title, securities, and property used in trade or business. To be allowed as evidence of the intended disposition, the document must either be in the testator's handwriting or be signed by him, and it must describe the property and the intended recipients. It is immaterial that the document was prepared before or after the execution of the will or that it was altered after its preparation.<sup>228</sup> A typical situation where this provision would be most useful would be that of allowing a testator to list both his personal effects and the persons he desired to take these specific items without requiring him

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<sup>222</sup>UNIFORM PROBATE CODE § 2-511; W. VA. CODE ANN. §§ 41-3-8 to -11 (1966).

<sup>223</sup>UNIFORM PROBATE CODE § 2-512.

<sup>224</sup>Bosserman v. Burton, 137 Va. 502, 120 S.E. 261 (1923).

<sup>225</sup>Ginter's Ex'rs v. Shelton, 102 Va. 185, 45 S.E. 892 (1903).

<sup>226</sup>ATKINSON, *supra* note 26, § 81.

<sup>227</sup>UNIFORM PROBATE CODE § 2-513, Comment.

<sup>228</sup>*Id.* § 2-513.

to reexecute his will where there is a change of mind as to the disposition sought. This list may even be altered from time to time as the testator desires. To do so, the testator would be required only to write the changes in his own hand or to sign the instrument making the changes. West Virginia has no comparable statutory provision, and the Uniform Code would, therefore, change present West Virginia law. The written list would not fit under the doctrine of incorporation by reference, since the writing need not be in existence at the time the will was executed, a requirement of the doctrine,<sup>229</sup> nor would the writing have independent legal significance apart from the disposition of property under the will.<sup>230</sup>

### *Part 6. Rules of Construction.*

All of the rules of construction set forth in this part are intended to be presumptions and will yield where a contrary intent is expressed by the testator in the will.<sup>231</sup> This, of course, is a fundamental rule in the construction of wills: The intent of the testator will control so long as it is not inconsistent with a rule of law.<sup>232</sup>

As it does in the case of intestate succession,<sup>233</sup> the Uniform Code provides that the devisee who does not survive the testator by five days shall be treated as if he predeceased him.<sup>234</sup> This provision does not apply, however, if the will deals with simultaneous deaths or otherwise requires survival.<sup>235</sup> Although West Vir-

<sup>229</sup>See generally, ATKINSON, *supra* note 26, § 80; 2 W. PAGE, WILLS §§ 19.17-36 (3d ed. W. Bowe & D. Parker 1960); Dobie, *Testamentary Incorporation by Reference*, 3 VA. L. REV. 583 (1916); Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, 25 COL. L. REV. 879 (1925); Evans, *Nontestamentary Acts and Incorporation by Reference*, 16 U. CHI. L. REV. 635 (1949); Malone, *Incorporation, by Reference, of an Extrinsic Document into a Holographic Will*, 16 VA. L. REV. 571 (1930); Mechem, *The Interpretation of Holographic Wills*, 12 N.C.L. REV. 213, 225 (1934).

<sup>230</sup>See generally Atkinson, *supra* note 26, § 81; Evans, *Incorporation by Reference, Integration, and Nontestamentary Act*, *supra* note 229; Evans, *Nontestamentary Act and Incorporation by Reference*, *supra* note 229.

<sup>231</sup>UNIFORM PROBATE CODE, Article II, Part 6, General Comment; § 2-603.

<sup>232</sup>*Butler v. Rader*, 187 S.E.2d 627 (W. Va. 1972); *Guthrie v. First Huntington Nat'l Bank*, 184 S.E.2d 628 (W. Va. 1971); *Security Nat'l. Bank & Trust Co. v. Willim*, 152 W. Va. 27, 158 S.E.2d 715 (1968); *Mauzy v. Nelson*, 147 W. Va. 764, 131 S.E.2d 389 (1963). See also, Brown, *The Testator's Intent—Vague Meanings of Clear Sounding Phrases*, 69 W. VA. L. REV. 133 (1967); 70 W. VA. L. REV. 442 (1968).

<sup>233</sup>See notes 63-68 *supra* and accompanying text.

<sup>234</sup>UNIFORM PROBATE CODE § 2-601.

<sup>235</sup>*Id.*

ginia has adopted the Uniform Simultaneous Death Act,<sup>236</sup> it has no provision comparable to this.

The Code allows a testator to select the law of the state that he wishes to govern the interpretation of his will without regard to the traditional<sup>237</sup> determination of the location of the property.<sup>238</sup> West Virginia has followed the traditional rules that a will, as it relates to the disposition of real property located in West Virginia, is interpreted by West Virginia law, and as it relates to personal property, is interpreted in accordance with the law of the testator's domicile.<sup>239</sup> Both the Code<sup>240</sup> and the West Virginia law<sup>241</sup> allow after-acquired property to pass by the will unless, of course, a contrary intent appears from the will.<sup>242</sup>

The antilapse provisions of the two statutes differ significantly. Under the Uniform Code, the application of the statute is limited to relatives who are of no more remote degree of kinship than grandparents or lineal descendants of grandparents.<sup>243</sup> This is consistent with the Code policy of eliminating remote relatives from inheriting.<sup>244</sup> The West Virginia provision saves the gift for the issue of any devisee or legatee if those issue survive the testator, regardless of whether the devisee or legatee was related to the testator.<sup>245</sup>

Both statutes save the void gift, *i. e.*, gifts made to persons who were dead at the time the will was executed.<sup>246</sup> Further, both statutes apply to class gifts, the Uniform Code expressly and West Virginia by implication. Neither specifically answers the question of who takes the share of a class member who predeceases the testator leaving no surviving issue, but it would appear that both would allow the other members of the class to share equally in the predeceased member's share.

<sup>236</sup>W. VA. CODE ANN. §§ 42-5-1 to -10 (1966).

<sup>237</sup>See H. GOODRICH, CONFLICTS OF LAWS §§ 166-67 (4th ed. 1964); R. LEFLAR, AMERICAN CONFLICTS LAW § 198 (1968); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 380 (3d ed. 1963).

<sup>238</sup>UNIFORM PROBATE CODE § 2-602.

<sup>239</sup>*In re Estate of Briggs*, 148 W. Va. 294, 134 S.E.2d 737 (1964).

<sup>240</sup>UNIFORM PROBATE CODE § 2-604.

<sup>241</sup>W. VA. CODE ANN. § 41-3-1 (1966).

<sup>242</sup>*Jarvis v. Jarvis*, 121 W. Va. 388, 3 S.E.2d 619 (1939); *McComb v. McComb*, 121 W. Va. 53, 200 S.E. 49 (1939); *Dearing v. Selvey*, 50 W. Va. 4, 40 S.E. 478 (1901).

<sup>243</sup>UNIFORM PROBATE CODE § 2-605.

<sup>244</sup>*Id.* § 2-103.

<sup>245</sup>W. VA. CODE ANN. § 41-3-3 (1966).

<sup>246</sup>ATKINSON, *supra* note 26, at 781.

Both statutes provide that if a gift under a will fails and is not saved from lapse, the attempted gift becomes a part of the residue.<sup>247</sup> If the residuary gift fails completely, the residue would pass by intestacy. If the residuary is devised to two or more persons, however, and the share of one fails for some reason, under the Code that share passes to the other residuary devisees in proportion to their interest in the residuary gift.<sup>248</sup> This provision allows the takers of a residuary class gift to share the portion a predeceased member of the class would have taken. The same would hold true under present West Virginia law. It should be noted that all rights of survivorship have been abolished in West Virginia between devisees and legatees to whom property is left jointly. There is no instance, save where the surviving joint devisee or legatee is also the sole heir at law of the testator, in which such a surviving devisee or legatee would be allowed to take the whole estate devised.<sup>249</sup> Even in that situation, the taking would be by operation of the statute and not by the nature of the estate devised.<sup>250</sup>

The Code recognized that changes in, and accessions to, securities that are specifically devised frequently cause litigation,<sup>251</sup> and in an attempt to reduce this litigation the Code has spelled out the rights of the specific devisee.<sup>252</sup> West Virginia does not have a comparable statutory provision.<sup>253</sup> The Code further provides for a lim-

<sup>247</sup>UNIFORM PROBATE CODE § 2-606; W. VA. CODE ANN. § 41-3-4 (1966).

<sup>248</sup>UNIFORM PROBATE CODE § 2-606(b).

<sup>249</sup>W. VA. CODE ANN. § 41-3-3 (1966).

<sup>250</sup>Hoke v. Hoke, 12 W. Va. 427 (1878).

<sup>251</sup>See generally, T. ATKINSON, *supra* note 26, at § 135.

<sup>252</sup>UNIFORM PROBATE CODE § 2-607.

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(1) as much of the devised securities as is a part of the estate at time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

<sup>253</sup>See Cuppett v. Neilly, 143 W. Va. 845, 105 S.E.2d 548 (1958).



ited nonademption if the specifically devised property is sold by a conservator or if there is a condemnation award or fire or casualty insurance proceeds in relation to the devised property are paid to a conservator.<sup>254</sup> Furthermore, the Code also provides for nonademption if the specifically devised property has been removed from the testator's estate within a short time before his death.<sup>255</sup> In each of these situations there has been such a material alteration in the devised property that a majority of states, including West Virginia,<sup>256</sup> would hold the devise to be adeemed.

The Uniform Probate Code's provision eliminating the right to exoneration of a specific devise<sup>257</sup> reverses the common law rule<sup>258</sup> and adopts the contrary rule—specific devises pass subject to security interests existing at the date of death, regardless of the will's general directive to pay debts.<sup>259</sup> While there are no West Virginia statutes or cases on point, the West Virginia rule has long been that the personal property of a decedent is the primary source for the payment of debts of all classes.<sup>260</sup> The Virginia court has upheld the doctrine of exoneration in cases where the will has expressly directed the payment of debts from personal property,<sup>261</sup> but it has refused to do so where the manifest intention of the testator would be defeated.<sup>262</sup> It seems likely that West Virginia would follow the same course.

The Uniform Code adopts the rule that unless a will makes specific reference to a power of appointment or some other indication of intent to exercise is shown, a general residuary clause or a will making a general disposition of the testator's estate does not exercise the power of appointment held by the testator.<sup>263</sup> This is the opposite of the West Virginia statute, which provides that a devise or bequest shall be construed to operate as an exercise of a power of appointment unless a contrary intent appears in the will

<sup>254</sup>UNIFORM PROBATE CODE § 2-608.

<sup>255</sup>*Id.* § 2-608(b)(i)(4).

<sup>256</sup>Cuppert v. Neilly, 143 W. Va. 845, 105 S.E.2d 548 (1958); Swann v. Swann, 131 W. Va. 555, 48 S.E.2d 425 (1948); Dunn's Ex'rs v. Renick, 40 W. Va. 349, 22 S.E. 66 (1895).

<sup>257</sup>UNIFORM PROBATE CODE § 2-609.

<sup>258</sup>See ATKINSON, *supra* note 26, at § 137.

<sup>259</sup>UNIFORM PROBATE CODE § 2-609, Comment.

<sup>260</sup>W. VA. CODE ANN. §§ 44-2-21,-22 (1973 Supp.); Bank of Mill Creek v. Elk Horn Coal Corp., 136 W. Va. 36, 65 S.E.2d 892 (1951).

<sup>261</sup>French v. Vradenburg's Ex'rs, 105 Va. 16, 52 S.E. 695 (1906).

<sup>262</sup>Kellam's Ex'rs v. Jacob, 152 Va. 725, 148 S.E. 835 (1929).

<sup>263</sup>UNIFORM PROBATE CODE § 2-610.

or unless the instrument which created the power of appointment requires that the power must be specifically referred to and expressly exercised.<sup>264</sup> The Commissioners set forth two reasons for the Code rule: (1) It is the majority rule in this country; and (2) most powers of appointment are created in marital deduction trusts, and the donor would prefer to have the property pass under his trust in the absence of a specific exercise of the power by the donee.<sup>265</sup>

In order to expedite the determination of persons to be included in gifts to a class, the Uniform Code has adopted for wills the rules applied under intestate succession for determining certain relationships.<sup>266</sup> Oftentimes, when there is class gift terminology in the will, questions of construction arise concerning the determination of who is to be included within the class of persons to whom the gift is made. These determinations have generated considerable litigation in many states, including West Virginia, and courts are divided on who should be included within the class. Under the Code provision, for example, adopted children would be included within a class gift "to the children of A." Under the present West Virginia construction an adopted child would not be included in a class gift to the children of the adoptive parent, unless a contrary intent was disclosed by the will.<sup>267</sup> Further, an illegitimate child may only be included in a gift to the mother's children and not to the natural father's children.<sup>268</sup> Also, if the class contained both whole and half blood members, the half blood members of the class would presumably take only half the share taken by the full blood members of the class.<sup>269</sup> The Uniform Code would include adopted, illegitimate and half blooded children in a class gift to an equal extent with the other children of the testator.

Concomitant with their differences in the application of the intestate doctrine of advancements,<sup>270</sup> the Uniform Code and West Virginia law also differ in the testate doctrine of satisfaction of

<sup>264</sup>W. VA. CODE ANN. § 41-3-6 (1966).

<sup>265</sup>UNIFORM PROBATE CODE § 2-610, Comment.

<sup>266</sup>*Id.* § 2-611. See notes 61-62, 69-81 *supra* and accompanying text.

<sup>267</sup>Security Nat'l Bank & Trust Co. v. Willim, 151 W. Va. 429, 153 S.E.2d 114 (1967); Wheeling Dollar Sav. & Trust Co. v. Stewart, 128 W. Va. 703, 37 S.E.2d 563 (1946). See also 70 W. VA. L. REV. 132 (1967).

<sup>268</sup>Pace v. Celebrezze, 243 F. Supp. 317 (S.D.W. Va. 1965).

<sup>269</sup>W. VA. CODE ANN. § 42-1-2 (1966); Billups v. Bartram, 96 W. Va. 601, 123 S.E. 442 (1924).

<sup>270</sup>See notes 82 to 93 *supra* and accompanying text.

legacies. The Uniform Code provision<sup>271</sup> follows the same policy approach taken in the advancement situation and abolishes the presumption of satisfaction by requiring written evidence of the testator's intent to treat an inter vivos gift as a satisfaction of a bequest under a will.<sup>272</sup> The West Virginia provision<sup>273</sup> likewise parallels the West Virginia advancement doctrine and includes the presumption that an inter vivos gift to the devisee shall be in satisfaction of the bequest contained in a previously made will, unless the presumption is rebutted by parole or other evidence.<sup>274</sup>

### *Part 7. Contractual Arrangements Relating to Death.*

The Uniform Probate Code provides that a contract concerning succession, either to make, revoke, or not to make a will, can be established if the will either sets out the material provisions of the contract, makes specific reference to the contract by extrinsic evidence to prove its terms, or if there is a separate writing signed by the decedent evidencing the contract. Furthermore, the execution of joint or mutual wills does not create a presumption of a contract not to revoke.<sup>275</sup> The stated purpose of this section is "to tighten the methods by which contracts concerning succession may be proved."<sup>276</sup> The Commissioners were concerned with the amount of litigation resulting from oral contracts not to revoke and the use of a presumption that the parties had contracted not to revoke when joint wills were executed. "Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect *normal* rules regarding admissibility of evidence."<sup>277</sup>

The adoption of this Code provision would reverse present West Virginia law, under which it has long been settled that an oral contract to make a will is valid and enforceable so long as it is certain and definite in terms and based upon sufficient consider-

<sup>271</sup>UNIFORM PROBATE CODE § 2-612.

<sup>272</sup>*Id.* § 2-612, Comment.

<sup>273</sup>W. VA. CODE ANN. § 41-3-2 (1966).

<sup>274</sup>*Cf.* *Harrison's Ex'r v. Harrison's Adm'r*, 171 Va. 224, 198 S.E. 902 (1938); *Garrett v. Andis*, 159 Va. 150, 165 S.E. 657 (1932). These Virginia cases are constructions of an identical Virginia statutory provision. VA. CODE ANN. § 64-63 (1950); see W. VA. CODE ANN. § 41-3-2, Editor's note (1966).

<sup>275</sup>UNIFORM PROBATE CODE § 2-701.

<sup>276</sup>*Id.* § 2-701, Comment.

<sup>277</sup>*Id.* (emphasis added). Thus, the operation of the dead man's statute, see, e.g., W. VA. CODE ANN. § 57-3-1 (1966), should not be affected.

ation.<sup>278</sup> Thus, the Code would preclude recovery by way of “quasi specific performance”<sup>279</sup> when the contract and the evidence of it rest entirely in parole. The present West Virginia rule that part performance by one of the parties to the oral contract removes it from the Statute of Frauds<sup>280</sup> would be eliminated by the Uniform Code’s requirement of a writing. While joint or mutual wills are not by themselves enough to establish a contract not to revoke under current West Virginia law, the mutual bequests are evidence of a contractual arrangement between the makers.<sup>281</sup> Furthermore, it has been held *not* to be essential that the contract be established by direct evidence. If the facts and circumstances are such as to raise an implication that a contract was entered into, this will be sufficient.<sup>282</sup> Facts and circumstances that the court will consider to determine whether a contract was intended include such things as the fact the wills were written and executed at the same time, that each testator knew the provisions of the other’s will, that the text of both wills was the same, and that the instructions and discussions of the parties preparatory to drafting the instruments were indicative of a prior understanding and agreement.<sup>283</sup> This “contract by implication” in situations of a joint or mutual will would no longer be valid under the Uniform Code.

### *Part 8. General Provisions.*

The general comment to Part 8 states that the three provisions contained therein cut across both testate and intestate succession.<sup>284</sup> The first of these deals with the renunciation of succession either under a will or at intestate succession.<sup>285</sup> Both West Virginia and the Uniform Code have eliminated the inconsistency of allow-

<sup>278</sup>*Mullins v. Green*, 143 W. Va. 888, 105 S.E.2d 542 (1958); *Lantz v. Reed*, 141 W. Va. 204, 89 S.E.2d 612 (1955); *Gray v. Marino*, 138 W. Va. 585, 76 S.E.2d 585 (1953); *Hedrick v. Harper*, 135 W. Va. 47, 62 S.E.2d 265 (1950); *Harris v. Harris*, 130 W. Va. 100, 43 S.E.2d 225 (1947); *Turner v. Theiss*, 129 W. Va. 23, 38 S.E.2d 369 (1946); *Jefferson v. Simpson*, 83 W. Va. 274, 98 S.E. 212 (1919); *Davidson v. Davidson*, 72 W. Va. 747, 79 S.E. 998 (1913).

<sup>279</sup>Note, *Oral Contracts To Devise and Bequeath in West Virginia*, 58 W. Va. L. Rev. 398 (1956).

<sup>280</sup>*Lantz v. Reed*, 141 W. Va. 204, 89 S.E.2d 612 (1955).

<sup>281</sup>*Turner v. Theiss*, 129 W. Va. 23, 38 S.E.2d 369 (1946); *Wilson v. Starback*, 116 W. Va. 554, 182 S.E. 539 (1935); *Underwood v. Myer*, 107 W. Va. 57, 146 S.E. 896 (1929).

<sup>282</sup>*Turner v. Theiss*, 129 W. Va. 23, 38 S.E.2d 369 (1946).

<sup>283</sup>*In re Reed's Estate*, 125 W. Va. 555, 26 S.E.2d 222 (1943).

<sup>284</sup>UNIFORM PROBATE CODE, Article II, Part 8, General Comment.

<sup>285</sup>*Id.* § 2-801.

ing a devisee under a will to renounce his gift but not allowing the heir-at-law to renounce his share at intestate succession. The West Virginia statutory provision allows any competent adult to renounce any interest in property he may receive by way of a will or by the laws of descent and distribution.<sup>286</sup> Renounced property passes as the will directs when there is a provision for renunciation in the will, or, absent such provision, as if the renouncer had immediately predeceased the testator in the case of a will, or in the case of intestacy, as if the renouncer had predeceased the decedent. The West Virginia statute requires, as does the Uniform Code, that the renunciation be in writing, signed by the renouncer, and acknowledged with the same degree of formality as would be required to admit a deed to record.<sup>287</sup> Under the Uniform Code, renounced property passes as if the renouncer failed to survive the decedent.<sup>288</sup> Intestate property passes to the heir who would take if the renouncer had predeceased the decedent and, for consistency, the same rule is applied to the renunciation of a will.<sup>289</sup> The Code allows the devisee or heir to renounce his inheritance in whole or in part, while the West Virginia statute is silent as to whether there can be a partial renunciation. Furthermore, the presence of a spendthrift provision will not affect the right to renounce under the Code,<sup>290</sup> which also provides that the right to renounce must be exercised within six months after the decedent's death or after the taker is ascertained.<sup>291</sup> Under the West Virginia statute, renunciation rights must be exercised within two months of the decedent's death or the probate of the will, unless there is a will contest, in which case the time period is extended to two months from the final decision.<sup>292</sup>

Will provisions in favor of a spouse are revoked by a subsequent divorce or annulment under the Code,<sup>293</sup> but not under present West Virginia law.<sup>294</sup> The Code<sup>295</sup> has expanded this principle to bar the surviving spouse in certain situations, as for example, the invalid divorce or annulment. Under this provision all statu-

<sup>286</sup>W. VA. CODE ANN. § 42-4-3 (1966).

<sup>287</sup>*Id.*

<sup>288</sup>UNIFORM PROBATE CODE § 2-801(c).

<sup>289</sup>*Id.* § 2-801, Comment.

<sup>290</sup>*Id.* § 2-801(e).

<sup>291</sup>*Id.* § 2-801(b).

<sup>292</sup>W. VA. CODE ANN. § 42-4-3 (1966).

<sup>293</sup>UNIFORM PROBATE CODE § 2-508.

<sup>294</sup>See notes 204-09 *supra* and accompanying text.

<sup>295</sup>UNIFORM PROBATE CODE § 2-802.

tory rights as well as will benefits are terminated if the required definitive legal act is present.<sup>296</sup> No person who obtains or consents to a divorce or annulment, even though the decree is not valid, is considered a surviving spouse unless the parties subsequently remarry or live together as man and wife.<sup>297</sup> If the ex-spouse marries another person following a divorce or annulment obtained by the decedent, all benefits are also terminated.<sup>298</sup> Finally, if the spouse was a party to a valid proceeding in which all marital property rights were terminated by court order, this will also estop all claims of succession rights based on the marital relation.<sup>299</sup> A legal separation, however, does not affect succession rights.<sup>300</sup>

Under the West Virginia statutes, divorce<sup>301</sup> or annulment<sup>302</sup> bars the spouse's rights to dower, except in the case of a divorce from bed and board,<sup>303</sup> which does not deprive the spouse of marital property rights.<sup>304</sup> The West Virginia statute also provides that the court, in a divorce or annulment case, has the power to restore to each party his separate property.<sup>305</sup> Furthermore, the courts recognize the right of divorcing spouses to enter into property settlements that are approved by the court in connection with divorce proceedings.<sup>306</sup> It would seem that if the property rights of the parties are raised in such a proceeding, and the suit is disposed of by an absolute divorce decree without settling the property rights, then the property rights of the parties would be left in the same state as they were at the time of the decree. On the other hand, if the property rights are disposed of in the suit, then it would seem that, as between the parties, the rights to marital property would become *res judicata* by the divorce.<sup>307</sup> Adoption of the Uniform Probate Code would clarify this point in the West Virginia law.

The Uniform Code contains an optional provision which pre-

<sup>296</sup>*Id.* § 2-802, Comment.

<sup>297</sup>*Id.* § 2-802(b)(1).

<sup>298</sup>*Id.* § 2-802(b)(2).

<sup>299</sup>*Id.* § 2-802(b)(3).

<sup>300</sup>*Id.* § 2-802(a); § 2-802, Comment.

<sup>301</sup>W. VA. CODE ANN. § 48-2-20 (1973 Supp.).

<sup>302</sup>*Id.* § 48-2-19.

<sup>303</sup>*Id.* § 48-2-22.

<sup>304</sup>*Perine v. Perine*, 92 W. Va. 530, 114 S.E. 871 (1922); *Kittle v. Kittle*, 86 W. Va. 46, 102 S.E. 799 (1920).

<sup>305</sup>W. VA. CODE ANN. § 48-2-21 (1973 Supp.).

<sup>306</sup>*State ex rel. Collins v. Muntzing*, 151 W. Va. 843, 157 S.E.2d 16 (1967); *Farley v. Farley*, 149 W. Va. 352, 141 S.E.2d 63 (1965).

<sup>307</sup>*Cf.* 70 W. VA. L. REV. 271 (1968).

cludes a person who feloniously and intentionally kills another from taking any of the benefits which would accrue to the killer because of the death.<sup>308</sup> While very similar to the West Virginia statute,<sup>309</sup> there are some minor differences in the Code provision. West Virginia's law makes conviction of a felonious killing a conclusive bar against the killer benefiting as an heir-at-law, by will, or as an insurance beneficiary. Acquittal on a felony charge, however, does not mean that the killer will be allowed to benefit from the death. Where the statutory bar is inapplicable, as in the case where there is no conviction, or conviction only of a non-felonious killing, the West Virginia court has held that the rights of the killer to the deceased's property must be determined in a civil action applying common law principles.<sup>310</sup> The only West Virginia cases to deal with this problem have been concerned with the rights of a slayer-beneficiary to insurance proceeds from policies on the life of the slain insured.<sup>311</sup> These cases have held that the beneficiary, when found guilty of intentionally killing the insured, may not take the policy proceeds. Such decisions appear to rest on the ground of public policy.

Where insurance is not involved there are three lines of authority: (1) Legal title does not pass to the murderer as heir or devisee; (2) legal title passes and may be retained by the murderer regardless of his wrong; (3) legal title passes to the murderer, but equity will treat him as constructive trustee of the title because of the unconscionable mode of its acquisition and compel him to convey title to the heirs of the deceased, exclusive of himself.<sup>312</sup> It is highly probable that the West Virginia court would adopt the last of the three, particularly in light of some rather imprecise language in the earlier insurance cases to the effect that the court had already adopted the constructive trust theory.<sup>313</sup> Thus, a killer would receive legal title as the result of an acquittal on the criminal charge but a court of equity may impose a constructive trust upon the property if it is found that the accused was guilty of the wrong.<sup>314</sup>

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<sup>308</sup>UNIFORM PROBATE CODE § 2-803.

<sup>309</sup>W. VA. CODE ANN. § 42-4-2 (1966).

<sup>310</sup>Metropolitan Life Ins. Co. v. Hill, 115 W. Va. 515, 177 S.E. 188 (1934).

<sup>311</sup>E.g., Johnston v. Metropolitan Life Ins. Co., 85 W. Va. 70, 100 S.E. 865 (1919).

<sup>312</sup>Note, *Constructive Trusts in West Virginia*, 45 W. VA. L.Q. 357, 362 (1939).

<sup>313</sup>State v. Phoenix Mut. Life Ins. Co., 114 W. Va. 109, 114, 170 S.E. 909, 911 (1933).

<sup>314</sup>Note, *Equity — Inheritance From Ancestor Who Was Killed by Heir*, 58 W. VA. L. REV. 197 (1956).

This is the result that would clearly be reached under the Uniform Code.<sup>315</sup> The Code bar applies not only to heirs and devisees,<sup>316</sup> but also to joint tenants,<sup>317</sup> and beneficiaries of bonds, insurance policies, or other contractual arrangements,<sup>318</sup> as well as to anyone else who acquires property or interest as a result of the killing.<sup>319</sup>

The West Virginia statute refers to heirs, devisees, and insurance beneficiaries specifically and “otherwise” in a general sense without defining the term. One can assume that, as under the Uniform Code, this would preclude the acquisition of interest in any type of property in keeping with the principles of the statute. Both statutes provide that property under a will or at intestacy passes as if the killer had predeceased the decedent, and the Code passes joint property as if the killer had no rights of survivorship. The West Virginia statute also bars the conspirator of a killing even if the killing did not succeed, while the Uniform Code is silent on this point. The Code does provide protection for the bona fide purchaser for value who, without notice, buys property from the killer before rights under this section are adjudicated,<sup>320</sup> a provision not found in the West Virginia statute.

#### *Part 9. Custody and Deposit of Wills.*

The Uniform Code provides for the safekeeping of the will during the testator’s lifetime by depositing it with the probate court,<sup>321</sup> a provision not found in the West Virginia statutes. During the testator’s lifetime, only he or his authorized representative are entitled to possession of the document. In the case of a protected testator, his conservator may examine the will under court procedures designed to protect the confidential nature of the document insofar as is possible. This does not prevent, however, the opening of the will after death to determine the identity of the executor or other interested parties necessary for notification.<sup>322</sup>

Both statutes place a duty on the custodian of a will to deliver it upon notice of death to a person able to secure its probate, to

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<sup>315</sup>UNIFORM PROBATE CODE § 2-803(e).

<sup>316</sup>*Id.* § 2-803(a).

<sup>317</sup>*Id.* § 2-803(b).

<sup>318</sup>*Id.* § 2-803(c).

<sup>319</sup>*Id.* § 2-803(d).

<sup>320</sup>*Id.* § 2-803(f).

<sup>321</sup>*Id.* § 2-901.

<sup>322</sup>*Id.* § 2-901, Comment.



the appropriate court, under the Uniform Code,<sup>323</sup> or to the clerk of the county court, under the West Virginia statute.<sup>324</sup> Both statutes also provide for the recovery of damages sustained as a result of failure to deliver, and both provide for compelling delivery and punishing the recalcitrant for failure to deliver. Under the West Virginia provision the custodian has thirty days after notice of the testator's death to deliver the will, while the Uniform Code provides that it be delivered with "reasonable promptness."

Part II of this study will discuss the procedures for concluding the decedent's affairs and transferring his property to those entitled to it, as well as nonprobate transfers, trust administration, and due protection of a person under a disability.

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<sup>323</sup>*Id.* § 2-902.

<sup>324</sup>W. VA. CODE ANN. § 41-5-1 (1966).

## APPENDIX

COMPARISON OF WEST VIRGINIA AND UNIFORM  
PROBATE CODE PATTERNS OF INTESTATE  
SUCCESSION\*

## WEST VIRGINIA LAW

## UNIFORM PROBATE CODE

*Case I: Children or Their Lineal Descendant But No Surviving Spouse.*

Both real and personal property to children or their lineal descendants *per stirpes*.

Same

*Case II: Surviving Spouse and Children of the Decedent and Surviving Spouse.*

Real Property: All to children. Surviving spouse takes a dower interest of one third of all real estate deceased spouse was seized of or entitled to at any time during coverture that has not been lawfully barred or relinquished.

Personal Property: one-third of the surviving spouse, two-thirds of children equally, lineal descendants *per stirpes*.

First \$50,000 plus one-half of the balance of the intestate estate to surviving spouse. Children take the remaining one-half of balance equally.

*Case III: Surviving Spouse and Children, One or More of Whom Are Children of Decedent by a Prior Marriage.*

*Same as Case II*

One-half of surviving spouse, one-half to decedent's children equally, lineal descendants *per stirpes*.

*Case IV: Surviving Spouse and Parents But No Children.*

All to surviving spouse:  
Both real and personal  
property.

First \$50,000 plus one-half of  
balance to the surviving spouse.  
Parents take one-half of balance.  
If no parents, all to surviving  
spouse.