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INHERITANCE, THE SHARE OF THE SURVIVING SPOUSE, AND WILLS: ARKANSAS LAW AND THE UNIFORM PROBATE CODE COMPARED

Ellen B. Brantley and Richard W. Effland***

In its 1979 Session, the Arkansas General Assembly considered a bill (H.B. 169) which provided for the enactment of the Uniform Probate Code in Arkansas. The bill was a product of a commission, appointed by former Governor David Pryor, which studied the Code, amended some of its provisions, and drafted the bill to enact it. The bill was considered in Committee and on the floor of the House of Representatives, and was referred to the Joint Interim Committee on the Judiciary for consideration before the next regular session of the Assembly commencing in January 1981. Because of the pendency of this matter, the authors believed that a section by section comparison between the Uniform Probate Code and Arkansas law would be useful to lawyers, legislators, and others interested in probate law.

The article compares the Code, as embodied in H.B. 169, with existing Arkansas law in the areas of intestate succession, the share of the surviving spouse, and wills. The Code, and H.B. 169, cover many other areas as well, *e.g.*, the administration of decedents' estates, guardianship, survivorship accounts. The fact that these provisions are not covered in this article is not because they are unimportant.

However, a section by section comparison of the entire Code would be too lengthy for this article. Moreover, much of the controversy surrounding the enactment of the Code, both in Arkansas and elsewhere, has focused on the changes, both substantive and procedural, which the Code would make in the law of inheritance.

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And, while the authors believe that enactment of the Code at one time is preferable, they also believe, should that prove impossible, that enactment of portions of the Code could be desirable. If the "piecemeal" approach is adopted, the substantive law of inheritance treated in this article seems a good place to begin.

INTESTATE SUCCESSION

The goal of any intestate law should be to distribute the decedent's property as he or she would have distributed it by will. However, if one assumes that for purposes of notice and administrative convenience, one fixed scheme of intestate distribution is necessary, this scheme must be designed to effectuate the intent of the "average" intestate.¹ No state legislature has, so far as can be determined, made an attempt to ascertain this intent by empirical evidence. Indeed, there is a dearth of such evidence.² A large percentage of decedents die intestate. Perhaps this reflects general satisfaction with the intestate laws. On the other hand, several studies of the dispositions by will made by decedents indicate that a scheme quite different from that of the intestate laws of most American jurisdictions is usually followed.³ Assuming, as seems reasonable, that there is not likely to be a wide divergence of distributive desires between those who make a will and those who do not, these studies indicate that major changes, particularly in the share to be allocated to the surviving spouse, need to be made in the intestate laws of most jurisdictions.

1. It would theoretically be possible to allow a judicial determination of how an intestate's property should be distributed, but no American jurisdiction has chosen to do so. England's Inheritance (Provision for Family and Dependents) Act, 1975, c. 63 gives the court full authority to make provisions for the decedent's family from the estate without specifying any particular manner of distribution.

2. A recent public opinion survey on the desired distribution of property after death was reported in the *American Bar Foundation Research Journal*; the results of earlier surveys of testamentary disposition are summarized in the same article. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUNDATION RESEARCH J. 319.

3. In a study of wills probated in Cook County, Illinois, every decedent willed his or her entire estate to a surviving spouse, including situations in which the decedent had children. Dunham, *The Method, Process, and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252 (1962). This is not the intestate distribution in most American jurisdictions, including Arkansas.

Share of the Surviving Spouse

U.P.C. §§ 2-102; 2-103; 2-105; 2-106

Ark. §§ 61-149; 61-150; 61-201; 61-202; 61-203; 61-204; 61-206;
61-228

The Uniform Probate Code (hereinafter "U.P.C."), with a reference in the Comments to the fact that most wills of married persons leave the surviving spouse substantially more than the intestate laws, provides a larger share for the surviving spouse than do the laws of most American jurisdictions, including Arkansas.⁴

1. *When Decedent is also Survived by Issue*

If the issue who survived the decedent are also children of the surviving spouse, the U.P.C. gives the surviving spouse \$50,000 plus one-half of the remainder of the estate.⁵ If the issue are issue of a previous marriage, the surviving spouse receives only one-half of the estate.⁶ These provisions contrast not only with the typical intestate statutes, which provide a smaller share, typically one-third, but also with the results of the empirical studies which indicate that virtually all testators leave their entire estate to the surviving spouse.⁷ However, because the spouse, in the case where all surviving children are children of the marriage, receives allowances and exempt property as well as the first \$50,000, he or she receives the entire estate if the estate is under approximately \$63,500.

The U.P.C. simplifies the intestate scheme by creating no distinctions based on the sex of the surviving spouse, the fact the property is real or personal, or the source of the property. In contrast, Arkansas has a highly complex scheme for calculating the share of the surviving spouse. Arkansas allots only a small share to the spouse, if the children survive. When the decedent is survived by children, the surviving spouse is not even an "heir" under the Arkansas Table of Descent and Distribution, but takes only dower or curtesy.⁸ Dower and curtesy have been statutorily modified in Arkansas. Where the decedent leaves children, dower in land gives a surviving wife a life interest in one-third of all real estate the decedent owned during the marriage and one-third in fee simple of

4. U.P.C. § 2-102, Comment.

5. *Id.* § 2-102(3).

6. *Id.* § 2-102(4).

7. See note 3 *supra*.

8. ARK. STAT. ANN. § 61-149 (1971).

all personal property which he owned at death.⁹ Curtesy provides the same share if the decedent wife is survived by issue.¹⁰ The inadequacy of these shares is manifest not only by comparison with the testamentary schemes adopted by those who make wills, but also by the fact that these same shares are the non-barrable share allocated a spouse.¹¹ Surely a statute which presumes the average intestate would wish to leave his or her spouse the absolute minimum the law allows is not in accord with the intent of most persons.

2. *When the Decedent is not Survived by Issue*

If the decedent is not survived by issue, but does leave parents, the U.P.C. gives the spouse \$50,000 plus one-half the remainder, with the remaining property to the surviving parents or parent.¹² If there is no surviving parent, the surviving spouse takes the entire estate.¹³ The share allocated to the parents, which is the same as that allocated to children, has been criticized.¹⁴ On an ad hoc basis, it is much more difficult to justify the assumption that the "average" decedent would wish his parents to take a portion of his property in preference to his or her spouse than the assumption that he or she might desire his or her children to do so.¹⁵

In Arkansas the scheme for distribution is very complex where the decedent leaves a surviving spouse but no issue. The dower and curtesy statutes provide a different share for the surviving spouse where there are no surviving issue of the decedent. A widow receives an absolute interest in one-half of real estate, provided it is a new acquisition, and one-half of personalty. These proportions are against other heirs; her share is reduced to one-third as against creditors. In ancestral real property, the widow takes a life estate in one-half of the property. Again, this share is only one-third *vis a*

9. *Id.* §§ 61-201 (land), -202 (personal property).

10. *Id.* § 61-228.

11. *Id.* § 60-501. Note that there is no elective share for a surviving husband except where the wife's will was written before their marriage.

12. U.P.C. § 2-102(2).

13. *Id.* § 2-102(1).

14. See, e.g., Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447, 454 (1976).

15. It is interesting to note that the first three working drafts of the Uniform Probate Code did not contain this provision; instead, the surviving spouse would have taken the entire estate in preference to the decedent's parents, unless the surviving spouse had been married to the decedent for less than one year.

vis creditors.¹⁶ The curtesy statute provides a slightly different scheme for a surviving husband. He receives an absolute interest in one-half of personalty and realty which is a "new acquisition." He receives a life interest in one-third of ancestral property.¹⁷ These shares apply against collateral heirs. Against creditors, the husband receives a life estate in one-third of all realty and an absolute interest in one-third of personalty.

Additionally, the surviving spouse is also an heir under the Table of Descent and Distribution and will take a share in addition to dower or curtesy. Where the surviving spouse and the decedent have been married for three years or more, the surviving spouse takes the entire estate.¹⁸ Where the couple was married less than three years, the surviving spouse takes one-half of the remainder of the estate, with the other one-half going to surviving parents or parent or, if none, to the decedent's brothers and sisters or their descendants. In the absence of such takers, the remainder of the estate would descend to collateral relatives, as described in the next section.¹⁹ If there are no descendants entitled to take, the surviving spouse, though married to the decedent for less than three years, will take in preference to escheat.²⁰

This terribly elaborate scheme of dower and curtesy is not often used since calculation is necessary only when the decedent leaves no issue, but does leave a surviving spouse to whom he or she has been married for less than three years. Nevertheless, it is cumbersome and clearly does not comport with the intent of the average decedent in that it allows even a very distant relative to receive a portion of the estate in preference to a surviving spouse of less than three years. Even if the ultimate result is acceptable—the entire estate to a surviving spouse if there are no children and the couple has been married for at least three years—it would be preferable to reach that result more simply.

3. *When the Decedent Leaves No Surviving Spouse*

U.P.C. § 2-103

Ark. § 61-149

16. ARK. STAT. ANN. § 61-206 (1971).

17. *Id.* § 61-228.

18. *Id.* § 61-149(b).

19. *Id.* § 61-149.

20. *Id.* § 61-150.

The U.P.C., like existing law in every jurisdiction, provides for succession of the entire estate to the decedent's issue where the decedent leaves no surviving spouse.²¹ Arkansas has the same provision.²² Where the decedent leaves no issue, the U.P.C. provides for inheritance by the decedent's parents, or, if only one parent survives, by that parent.²³ Arkansas law follows the same pattern.²⁴ The next takers under the U.P.C. are "the issue of the parents," *i.e.*, brothers and sisters of the decedent, including half brothers or half sisters;²⁵ the next takers under current Arkansas law are "brothers and sisters" of the intestate and their descendants,²⁶ which produces the same distributive scheme.

Where the intestate is not survived by parents, brothers or sisters, or the issue of brothers and sisters, Arkansas and the U.P.C. part company. The U.P.C. provides that one-half of the estate goes to surviving grandparents or their issue on the maternal side, and one-half to these relations on the paternal side. If there are no collaterals of this degree on one side, the entire estate goes to the side which has such relatives.²⁷ In the same situation Arkansas law provides for inheritance by "surviving grandparents, uncles and aunts."²⁸ The difference between the two schemes can be illustrated by an example. Decedent dies, leaving only a first cousin on the maternal side and a grandmother and three great aunts on the paternal side. Under the U.P.C., the first cousin (issue of a grandparent) receives one-half of the estate, and the paternal grandmother receives the other one-half. Under current Arkansas law, each survivor would receive one-fifth.

While there is no evidence as to which scheme the "average" intestate would prefer, it seems fair to hypothesize that the average testator would prefer grandparents to more remote relatives such as aunts and cousins. Therefore, the U.P.C. scheme is probably preferable. In fact, the Arkansas scheme is highly unusual in that it allows more remote relatives (uncles and aunts) to inherit along with living relatives closer in degree (grandparents).²⁹

21. U.P.C. § 2-103(1).

22. ARK. STAT. ANN. § 61-149(a) (1971).

23. U.P.C. § 2-103(2), (3).

24. ARK. STAT. ANN. § 61-149(d) (1971).

25. U.P.C. § 2-103(3).

26. ARK. STAT. ANN. § 61-149(e) (1971).

27. U.P.C. § 2-103(4).

28. ARK. STAT. ANN. § 61-149(f) (1971).

29. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 16 (2d ed. 1953) [hereinafter

If there are no grandparents or issue of grandparents, the property will escheat under the U.P.C.³⁰ Under Arkansas law, the property will pass next to great grandparents and great aunts and great uncles, using the same distributive scheme. Each member of the class receives an equal share, as in the case of inheritance by "grandparents, uncles and aunts."³¹ The same criticism—that this approach treats more distant relatives equally with closer relatives—is applicable here. If there are no heirs of this class, under Arkansas law the property will pass to the surviving spouse of less than three years. If there is no surviving spouse, the property passes to the "heirs, determined as of the date of the Intestate's death . . . of the Intestate's deceased spouse. . . ." before escheat.³²

Both the Arkansas and the U.P.C. approaches represent a major change from common law in that they cut off inheritance at some degree. At common law, any relative of the decedent, no matter how distant, was allowed to inherit before escheat. There was also no provision for inheritance by relatives of the spouse.

Both the U.P.C. and Arkansas schemes solve the major problems of unlimited inheritance: the expense and difficulty of locating more remote relatives, the possibility of frivolous litigation contesting the will by "laughing heirs," and the administrative problems which could be caused by division of the estate into small portions. The U.P.C. provision, by limiting inheritance to grandparents and their descendants, goes further than Arkansas. Perhaps in today's society it is unlikely that family ties will be strong with more remote relatives or with relatives of the spouse, except perhaps the spouse's parents, brothers and sisters. To the extent this is true, the U.P.C. provision would also be more in keeping with the intent of the "average" testator. The U.P.C. would provide for escheat to the state more frequently, but in a society where the state is far more likely to provide care than remote relatives, this may be more appropriate.

Per Capita/Per Stirpes

The intestate statutes provide for inheritance by certain

cited as ATKINSON].

30. U.P.C. § 2-105.

31. ARK. STAT. ANN. § 61-149(f), (g) (1971).

32. *Id.* §§ 61-149(h), -150.

classes such as "brothers and sisters" or "children." When a member of a class designated as the recipient of decedent's property predeceases the decedent, but leaves descendants, the descendants may, under both the U.P.C. and current Arkansas law, share in the estate.³³ For example, if an intestate dies survived by one child and two grandchildren who are children of a predeceased child of the intestate, those grandchildren would take a portion of the estate under the U.P.C. and Arkansas law.³⁴

The shares of those relatives who take "by representation" are computed in one of two ways: *per stirpes* or *per capita*. *Per stirpes*, literally *by stocks*, means that the class which takes by representation takes the share that the ancestor they represent would have taken. In the above example, the two grandchildren take together one-half, which is the share that would have been taken by their parent.

Under a "pure" *per stirpes* distribution, the estate is divided at the level of children with a share for each child and a share for each predeceased child who leaves descendants. This division seems appropriate in some cases, but it can cause anomalous results. Suppose that the intestate is survived by nine grandchildren, one of whom is the child of a predeceased daughter, and eight of whom are the children of a predeceased son. Under pure *per stirpes*, the child of the predeceased daughter would receive one-half of the estate and the other eight grandchildren would receive one-sixteenth each. This result strikes most observers as unlikely to be in accordance with the intestate's wishes.³⁵

Neither Arkansas nor the U.P.C. use the pure *per stirpes* method. Instead, both use a modified *per stirpes* system.³⁶ Under

33. This is called the doctrine of representation. The descendants of the class member who predeceased the intestate "represent" their ancestor in inheritance.

34. U.P.C. § 2-103; ARK. STAT. ANN. §§ 61-134, -135, -149 (1971).

35. Additional support for this view can be found in the survey of people's wishes in regard to disposition of their estates conducted by Fellows, Simon, and Rau. When respondents were asked how they would like their property distributed if they were survived only by three grandchildren, one of whom was the child of a deceased son, and the other two the children of another deceased son, 94.9% wished each of the three grandchildren to take 1/3 of the estate. Fellows, Simon & Rau, *supra* note 2, at 382-83.

36. Technically, under both Arkansas law and the Uniform Probate Code, the heirs take *per capita* if they are all related to the decedent in the same degree; if they are related in unequal degrees, those who are related in the closest degree will take *per capita*, those in more remote degrees, *per stirpes*. These more remote heirs who are to inherit *per stirpes* are taking as representatives of an ancestor who would have been an heir had he survived; they may be related to their ancestor in unequal degrees. If so, they inherit under the same

this system, the estate is divided into shares at the first level at which a taker survives. In the above example, it would not be divided at the level of the children, because no children survived the decedent. Instead, it would be divided at the level of grandchildren so that each grandchild would receive one-ninth of the estate. The rationale for this approach is that it is more likely the intestate would want to treat relatives of the same degree equally, than that he would want the results under a pure *per stirpes* distribution.

The modified *per stirpes* system does solve some of the problems of pure *per stirpes* distribution, but a similar difficulty can still arise. For example, suppose the decedent were survived by a son and by nine grandchildren, one the child of a deceased daughter, and eight the children of a deceased son. Even under modified *per stirpes*, the estate is divided at the level of children, so the son takes one-third, the child of the deceased daughter takes one-third, and the children of the deceased son take one-twenty-fourth each. It has been suggested that a scheme should be adopted which would give the son one-third and divide the remaining two-thirds equally among the other takers.³⁷

The principle of representation also applies when property is inherited by collateral relatives. For example, if an intestate is survived only by two brothers and two nieces, the daughters of a deceased brother, each brother would take one-third and the nieces would take by representation the one-third of the estate which their deceased father would have received. These results would be the same under both the U.P.C. and Arkansas law.

In a situation in which the intestate is not survived by parents or brothers or sisters (or their issue), current Arkansas law and the U.P.C. produce different results. Under these circumstances, Arkansas's intestate statute provides for inheritance by "grandpar-

scheme—if they are related in equal degrees, *per capita*; if not, those in the closer degree, *per capita*, those in a more remote degree, *per stirpes*.

37. This suggestion was advocated by Professor Lawrence A. Waggoner in his article, *A Proposed Alternative to the Uniform Probate Code System for Intestate Distribution Among Descendants*, 66 Nw. U. L. Rev. 626 (1971). The Comments to § 2-103 of the 1977 edition of the Code report that a majority of the Joint Editorial Board favored changing the Code to incorporate this suggestion, but that others objected on the ground that a change in the original text, already adopted in several states, would weaken the uniformity of the enactments of the Code. However, since several states had already enacted statutes designed to implement the Code with deviations from the suggested language, Professor Waggoner's proposed alternative is included in the Comments. The Committee which drafted the bill to enact the Uniform Probate Code in Arkansas did not adopt this suggestion.

ents, uncles, and aunts."³⁸ As discussed above, this is a somewhat unusual situation since Anglo-American inheritance law usually does not provide for inheritance by the descendants of a living heir.³⁹ The U.P.C., using the modified *per stirpes* system mentioned above, provides for distribution only to grandparents, if living; aunts and uncles take only as representatives of predeceased grandparents of the intestate. It is difficult to understand exactly why the Arkansas statutory pattern was selected, or to argue for it.⁴⁰ The U.P.C. pattern not only seems more likely to comport with a decedent's wishes, but also is consistent with the general pattern of distribution, which allows inheritance by lineals or more closely related collaterals.

To summarize, the U.P.C. provisions for a "modified" *per stirpes* system would not change the pattern of inheritance under current Arkansas law when the heirs are lineal descendants. When there are no lineal descendants and inheritance is by collateral relatives, the U.P.C. would change existing law. Under the Code, grandparents would succeed to the estate in preference to aunts and uncles. This seems more likely to effectuate the average intestate's intent.

Problems of Status

1. *Relatives of the Half Blood*

U.P.C. § 2-107

Ark. § 61-145

The U.P.C. specifically provides that no distinction is made between relatives of the whole blood and relatives of the half blood.⁴¹ For example, a half sister would be treated exactly as a full sister for all inheritance purposes. Arkansas's statute, while

38. ARK. STAT. ANN. § 61-149(f) (1971). Note that in situations in which the intestate is survived by neither parents, siblings, grandparents, aunts or uncles, inheritance is by "great grandparents and great uncles and great aunts." *Id.* § 61-149(g) (1971).

39. Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3, 12. See also the discussion at note 29, *supra*.

40. In his article, *The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future*, 23 ARK. L. REV. 313, 347 (1969), Professor Robert R. Wright indicates that the 1969 revision of the statute of descent and distribution merely clarified existing law. He later comments on the difference between Arkansas law and the Code, "it would seem that the U.P.C. is correct. An intestate is generally more likely to bear a close relationship with his grandparents than with his uncles and aunts." *Id.* at 348.

41. U.P.C. § 2-107. Relatives of the half blood are persons with whom the decedent shares one common ancestor, *i.e.*, half brothers or half sisters and their descendants.

worded somewhat differently, has similar provisions.⁴² Both are in contrast to the common law position, which excluded half blooded relatives completely,⁴³ and to the several later methods of inheritance devised in American jurisdictions. These methods included (1) allowing inheritance by relations of the half blood, but giving them only one-half the share of a full blooded relative of the same degree,⁴⁴ or (2) allowing inheritance by half bloods, but "demoting" them. Under the latter plan, a half blooded relative would be excluded by a whole blooded relative of the same degree but would take in preference to a whole blooded relative of a lesser degree.⁴⁵

It is difficult to determine which treatment of half blooded relatives is likely to effectuate the "average" intestate's intentions. Where the intestate and a half blooded sibling have been reared in the same household, it seems likely that a family relationship very much like whole blooded siblings would result. In other situations, the half blooded relative may have had little actual relationship with the intestate. Since disposition by will can always accommodate differing situations, the approach taken by the U.P.C. and current Arkansas law, as well as by most other jurisdictions, seems appropriate.⁴⁶

2. *Posthumous Heirs*

U.P.C. § 2-108

Ark. § 61-142

The U.P.C. provides that all "relatives" of the decedent conceived, though unborn, at his death will share in the estate as if they had been born before his death.⁴⁷ Under Arkansas law, only "descendants" conceived before the intestate's death may inherit as posthumous heirs; therefore, if collateral relatives are the heirs, only those born at the time of the intestate's death may receive the property.⁴⁸

The situations in which this distinction is critical are few, since if the parents of the unborn child are alive, the one related to the intestate will be the heir. However, it could make a difference

42. ARK. STAT. ANN. § 61-145 (1971).

43. ATKINSON, *supra* note 29, § 8.

44. *Id.* § 19.

45. *Id.*

46. *Id.*

47. U.P.C. § 2-108.

48. ARK. STAT. ANN. § 61-142 (1971).

in a limited number of cases. For example, suppose the intestate were survived by a niece, the daughter of a deceased sister, and that at the time of his death, the widow of the decedent's brother was pregnant. Under current Arkansas law, the niece would inherit to the exclusion of the unborn child of the intestate's brother who would be of the same degree of relationship to the intestate. Under the U.P.C., the niece and the unborn niece or nephew would share equally.

There appears to be no reason to exclude such an unborn child. Since distribution of the estate will almost surely take longer than gestation, there is no administrative problem in his or her inclusion. Arkansas law already extends inheritance to a posthumous descendant and there seems to be no rationale for treating posthumous collateral relatives differently from posthumous descendants. Adoption of the U.P.C. provision would place Arkansas in line with the majority of American jurisdictions.⁴⁹

3. *Adoption*

U.P.C. § 2-109; 2-113

Ark. §§ 56-201 to -221

In its definition of "child," the U.P.C. follows the modern trend by treating an adopted child precisely the same as a natural child. Under the U.P.C., the adopted child not only inherits from both adoptive parents but also "through" them, and they inherit from him. Moreover, all ties with the natural parents are severed and the child neither inherits from or through them nor do they inherit from him.⁵⁰

Arkansas has adopted the Revised Uniform Adoption Act.⁵¹ This statute is a comprehensive adoption statute which includes procedural provisions for adoption. Section 56-215 governs the effect of adoption on inheritance and provides that an adopted child is treated the same as a natural child for all inheritance purposes. Under this statute, a final decree of adoption terminates all legal relationship between the adopted child and his natural parents "for all purposes including inheritance." This creates the relationship of parent and child between the adopted child and the adoptive parents "as if the adopted child were a legitimate blood de-

49. ATKINSON, *supra* note 29, § 16.

50. U.P.C. § 2-109.

51. ARK. STAT. ANN. §§ 56-201 to -221. (Cum. Supp. 1979).

scendant of the petitioner (adoptive parent), for all purposes including inheritance. . . ."⁵²

Both statutes represent a great change from the common law, which did not recognize adoption,⁵³ and from intermediate statutory treatments of adoption. These statutes often permitted inheritance from the adoptive parents to the child; some allowed inheritance "through" them while others did not.⁵⁴ Moreover, the adopted child frequently could also inherit from his natural parents.⁵⁵ The rights of inheritance from an adopted child were often governed by the source of the property.⁵⁶ Both Arkansas and the U.P.C., in treating the adopted child as a natural child, have eliminated the problems these statutes often caused, and have, it seems clear, brought the inheritance laws in this area into line with the intent of the average intestate.⁵⁷

Although the Arkansas statute and the U.P.C. would reach the same result in almost every case, there is one possible area of difference. Under the U.P.C., if the spouse of one natural parent adopts the child, the adoption does not affect the parental relationship with the other natural parent.⁵⁸ In Arkansas, adoption by the spouse of a natural parent will sever the parental relationship with the other parent except where the adoption occurs after the death of the other natural parent.⁵⁹ For example, if the natural parents of a child divorce, the wife remarries, and her husband adopts the child during the lifetime of the natural father in a U.P.C. jurisdiction, the child would still inherit from and through the natural father, and the natural father from him. In Arkansas, this would not be the case.

As a practical matter, adoption by the spouse of a natural parent during the lifetime of the other natural parent is somewhat

52. *Id.* § 56-215.

53. ATKINSON, *supra* note 29, § 23.

54. Binavince, *Adoption and the Law of Descent and Distribution: A Comparative Study and a Proposal for Model Legislation*, 51 CORNELL L. Q. 152 (1966).

55. Comment, *The Adopted Child's Inheritance from Intestate Natural Parents*, 55 IOWA L. REV. 739 (1970).

56. Binavince, *supra* note 54, at 165.

57. While there appears to be no empirical study establishing the intention of the average intestate to have his property pass to adopted persons, whether adopted by him or by another, or to his adoptive parents or their heirs, this assumption underlies the whole recent trend in American jurisdictions to put the adopted child in the same position as the natural child.

58. U.P.C. § 2-109(1). *See also* Comment.

59. ARK. STAT. ANN. § 56-215(2)(b) (Cum. Supp. 1979).

rare, since, except in the case of illegitimacy, it requires abandonment or nonsupport of the child, the consent of the other natural parent, or a proceeding for termination of parental status.⁶⁰ Nonetheless, it does happen. Where it does happen it seems that the Arkansas position, terminating parental rights of the natural parent who does not support his child, who consents to adoption, or whose parental rights are legally terminated, is appropriate. He or she has relinquished his status as a parent and there seems to be no reason to allow inheritance. Of course in the case of adoption by the spouse of the natural parent after the death of the other natural parent, inheritance can only be *through* the deceased parent. This seems correct, in that the family relationship with relatives of the deceased natural parent is likely to continue. Therefore, Arkansas's existing law in this area, which has only recently been revised, seems preferable to the U.P.C. and ought to be retained.⁶¹

The U.P.C. contains a related provision which is devised to handle the situation in which a person is adopted by a relative.⁶² It provides that a person related to a decedent through two lines receives only a single share of the estate. This share is based on whichever relationship is closer. The comments to the U.P.C. indicate that this provision is designed to apply in the case where the brother or sister of a decedent marries the decedent's spouse and adopts his or her child. If the adoptive parent dies, the adopted child would be both the natural and the adopted grandchild of the grandparents and could, without such a statute, claim two shares of the estate.⁶³

4. *Illegitimacy*

U.P.C. § 2-109

Ark. § 61-141

The U.P.C. essentially treats an illegitimate child as the child of both its mother and father for all inheritance purposes. In this respect, it is a major innovation. Common law treated the illegiti-

60. *Id.* §§ 56-206 to -207.

61. The proposed bill to enact the Code does not contain a specific repealer for any portion of existing law. Presumably ARK. STAT. ANN. § 56-215 (Cum. Supp. 1979) would be repealed as inconsistent. The proposed bill could be altered by either omitting any reference in regard to adopted children or by stating in U.P.C. § 2-109 that inheritance rights are governed by ARK. STAT. ANN. § 56-215 (Cum. Supp. 1979).

62. U.P.C. § 2-114.

63. *Id.*, Comment.

mate as *filius nullius* (the child of no one), and he could not inherit from or through either parent, nor could anyone inherit from him.⁶⁴ In all American jurisdictions, that rule has been modified; in general, the illegitimate is able to inherit from and through his mother, but may be limited in his right to inherit from and/or through his father.⁶⁵ The U.P.C. provides that for inheritance purposes, an illegitimate child is the child of both mother and father, and that parentage should be established by the Uniform Parentage Act.

Few states, however, have adopted the Uniform Parentage Act,⁶⁶ so the U.P.C. provides an alternative for states which have not. Under this alternative, the illegitimate is the child of the mother and may inherit from and through her; he is also the child of the father if the parents "participate in a marriage ceremony before or after the child's birth," or if an adjudication of paternity is made before or after the father's death.⁶⁷ A second provision in this alternative is that in order for the father or his kin to inherit from or through the child, the father must have "treated the child as his own" and "not refused" to support him.⁶⁸ The Arkansas Committee on the U.P.C. proposed this alternative provision in the bill that it presented to the legislature.

At the time the Committee met, this provision was a significant change from existing Arkansas law. However, in the case of *Trimble v. Gordon*,⁶⁹ the United States Supreme Court invalidated a statute similar to Arkansas's. The statute considered in *Trimble* limited the inheritance rights of illegitimates to cases where the parents participated in a void ceremony before birth, or where the parents married after the child's birth and the father recognized the child. In the wake of *Trimble*, the 1979 Arkansas legislature amended the statute. The amendment left intact the earlier provision legitimizing the children of void marriages and children whose parents later marry and who are recognized by the father. It added provisions allowing an illegitimate to inherit from and through his father if there is (1) an adjudication of paternity, (2) a written ac-

64. ATKINSON, *supra* note 29, § 6.

65. J. RITCHIE, N. ALFORD & R. EFFLAND, *CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 71-72 (5th ed. 1977).

66. Seven states have adopted the Act. 9A UNIFORM LAWS ANNOTATED 579 (1979).

67. U.P.C. § 2-109(2) (alternative subsection).

68. *Id.* § 2-109(2)(ii).

69. 430 U.S. 762 (1977).

knowledge by the father or his written consent to entry of his name on the child's birth certificate, (3) intermarriage by the parents prior to the child's birth or attempt to do so but the marriage "is or could be declared invalid", or (4) an obligation of the father to support the child by written promise or court order.⁷⁰

The new Arkansas statute, apparently drafted in haste, has some problems. Subsections (d) (4) and (5) of section 61-141 which provide for inheritance if the parents "intermarry prior to the birth of the child" or if they attempt "to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid," seem to duplicate unrepealed section (a) of the same statute. There are, however, minor changes in wording. Despite the drafting problems, some of the provisions, such as legitimation by written acknowledgment or by the father's consent to entry of his name on the birth certificate, which are designed to allow inheritance without a court proceeding for legitimation may be an improvement over the U.P.C. In light of the new law in this area, the U.P.C. provision could well be revised to incorporate some of the provisions of current Arkansas law. Another and perhaps preferable alternative is the adoption of the Revised Uniform Parentage Act in Arkansas.

5. *Alienage*

U.P.C. § 2-112

Ark. § 61-143

The U.P.C. adopts the simple principle that a person's right to inherit property is not affected by his status as an alien.⁷¹ Arkansas law as amended in 1969 also makes alienage irrelevant to inheritance.⁷² Both statutes represent a change in the common law position which classified persons as "friendly" or "enemy" aliens and restricted the rights of "enemy" aliens to inherit property.⁷³ They also are in contrast to laws which have been passed in a number of jurisdictions restricting the rights of aliens unless the alien's country grants "reciprocal" inheritance rights to U.S. citizens or restricting the rights unless the alien can establish that he personally

70. ARK. STAT. ANN. § 61-141(d) (Cum. Supp. 1979).

71. U.P.C. § 2-112.

72. ARK. STAT. ANN. § 61-143 (1971).

73. ATKINSON, *supra* note 29, § 10.

will have the benefit of the property.⁷⁴

There are significant differences in drafting in the two statutes. Arkansas law speaks not only of the right to inherit, but also of the right to transmit by inheritance. The U.P.C. refers only to the right to inherit. Reference to the right to transmit seems unnecessary, as there has never been any restriction of the right of an alien to transmit property by inheritance.

The U.P.C. also provides that no one is disqualified if he claims through an alien. Arkansas does not have such a provision, and while no litigation has arisen over the question, the U.P.C. provision seems preferable as definitely settling the point.

Survivorship

U.P.C. § 2-104

Ark. § 61-124

The U.P.C. adds to the law of intestate succession the provision often found in wills that an heir must survive the decedent for a specified time period before he can inherit. The U.P.C. provides that any person who fails to survive the decedent by 120 hours is treated as having predeceased him.⁷⁵ The provision is useful for several reasons. First, when two closely related persons such as husband and wife die in the same occurrence, inheritance will depend on who died first. In order to determine this, all kinds of evidence bearing on who died first will be relevant, including medical evidence and expert testimony about the occurrence. Involved and expensive litigation can easily result. Second, once the order of death is determined, the property of the person who died first will have to be administered twice: first in his estate, then in the estate of the heir. Third, unintended results often occur. For example, if a husband and wife die in a car wreck and it is determined that the wife survived, though only by seconds, the husband's property passes to her, then through her estate to her heirs, rather than to his heirs.

Arkansas, like a number of states, has already attempted to deal with the problem by enacting the Uniform Simultaneous Death Act.⁷⁶ Unfortunately, the Act doesn't adequately solve all of these problems. It is limited to cases where death is "simultane-

74. See note 65 *supra*, at 113.

75. U.P.C. § 2-104.

76. ARK. STAT. ANN. § 61-124 (1971).

ous." Therefore, in a case where there is any evidence about time of death, the problems remain.

The U.P.C. provision solves these problems to a large degree. Not only does it greatly limit litigation over time of death and end double administration in most cases, it is also much more likely to result in effectuating the average intestate's intent. Since anyone who does not survive for even five days will not receive any beneficial enjoyment of the property, it is unlikely that the intestate would wish the property to descend in the usual manner. Under the U.P.C. provision, the heirs of the intestate rather than the heirs of the beneficiary will ultimately receive the property.

The only problem is that the U.P.C. provision may not go far enough. Suppose husband and wife are in an automobile accident; he is killed instantly, and she survives for a week. Since she survived more than five days, she will inherit the property. In view of the length of time it takes to administer an estate, she will never have beneficial use of it, and after her death, her heirs, not her husband's, will receive the property. The drafters of the U.P.C. did not include a longer survival period, though wills frequently provide for survival by thirty days or more. The five day period coincides with the time after a death that administration can begin.⁷⁷ And, since the U.P.C. provides for distribution without administration in many cases, a longer survival requirement could cause delay. In the large estate, which might require administration even under the U.P.C., a will is more likely, which can extend the survival feature.⁷⁸

Advancements

U.P.C. § 2-110

Ark. § 61-153

The U.P.C. vastly changes the common law position on treatment of an inter vivos gift from the intestate to an heir. At com-

77. U.P.C. §§ 3-302, -307.

78. The Federal Estate Tax marital deduction is available for a gift from one spouse to another even if the surviving spouse survives for only a brief period. In order to protect this deduction for a large estate in the case where the spouse survives for fewer than 120 hours (or the couple dies simultaneously), a will must be made. In an estate large enough to incur estate tax liability, wills are more likely. The drafters of the Code, recognizing that this provision would result in the loss of the marital deduction in some cases of intestacy, decided that the provision was preferable because it accommodates the typical estate. U.P.C. § 2-104, Comment.

mon law, any gift from an intestate to a lineal descendant might be an "advancement" if the decedent so intended.⁷⁹ Since the intent of the decedent is rarely clear at probate, this question was often litigated. Under the U.P.C., such a gift will not be treated as an advancement and deducted from that heir's portion of the estate unless the decedent leaves a contemporaneously written document stating that it is to be considered an advancement or the recipient acknowledges, in writing, that it is an advancement. The recipient's acknowledgment can be made at any time. The U.P.C. makes it clear that the doctrine of advancement applies only where the decedent dies intestate as to all his property, and that property found to be an advancement is valued (for purposes of calculating the share of the estate to which the recipient of the advancement is entitled) at the time he gets possession of the property or at the time of the decedent's death, should that event occur first, as where the property is a future interest. It also provides that an advancement to an heir who predeceases the intestate will not be taken into account in computing the share of that recipient's descendants who are heirs unless the contemporaneous writing or the recipient's acknowledgment provides otherwise.⁸⁰

For example, if the decedent who has three children at the time of the gift gives \$10,000 to his daughter and she acknowledges in writing that it is an advancement of part of her share of the estate, when the decedent dies, she will be charged with its receipt. If he leaves an estate of \$140,000, she would receive \$40,000, and the decedent's other children would get \$50,000 each. However, if she dies before her father, leaving two children, the estate will be divided without taking the advancement into account, unless the acknowledgment provides otherwise. Therefore, each of the intestate's surviving children would receive \$46,666, and the children of the recipient, who take by representation, would each receive \$23,333. Another novel feature of the U.P.C.'s treatment of advancement is the extension of the doctrine to any "heir," rather than limiting it to children of the intestate.

The Arkansas provision on advancements is virtually identical to the U.P.C., and in fact is the November 1967 draft of this section of the Code.⁸¹ It does not, however, require that a writing by

79. ATKINSON, *supra* note 29, § 129.

80. U.P.C. § 2-110.

81. ARK. STAT. ANN. § 61-153 (1971), compiler's note.

the decedent indicating that a gift or an advancement be "contemporaneous." Nor does it contain the language that an advancement to a recipient who predeceases the intestate may be used in calculating the shares of the recipient's descendants if the writing or acknowledgment so provides. These two variations in the U.P.C. were made after the enactment of this section in Arkansas in 1969. The first change prevents an intestate from giving property as a "gift," and then later changing his mind. The second merely extends the flexibility of the advancement as an estate planning tool. Obviously most persons who will take the trouble to place in writing instructions about how to treat an inter vivos gift in computing his intestate estate would make a will; but where the intestate laws are suitable, a person might choose to use inter vivos gifts, with such a declaration, in lieu of a will. While the differences between Arkansas law and the U.P.C. are small, the U.P.C. seems preferable.

Debts to Decedent

U.P.C. § 2-111

Ark. § 61-154

In the related matter of the treatment of debts owed by an heir to the decedent, the U.P.C. provides that such a debt will not be used in computing the share of any person other than the debtor.⁸² So if the decedent loans money to his daughter and she survives, the loan would be deducted from her share of the estate. But if she predeceases him, it would not be deducted from her descendant's shares.

Arkansas has already enacted a virtually identical section with very insignificant differences in wording.⁸³ The U.P.C. and the existing Arkansas provisions are in accord with current law in most American jurisdictions.⁸⁴

PROTECTION OF SPOUSE AND FAMILY

Introduction

Throughout Anglo-American law, and also in the civil law based system of inheritance, there is emphasis not only on effec-

82. U.P.C. § 2-111.

83. ARK. STAT. ANN. § 61-154 (1971).

84. ATKINSON, *supra* note 29, § 141.

tuating the decedent's intention in regard to disposition of his wealth, but also on requiring that some portion of it be devoted to his immediate family, even if he does not wish to do so.

In the common law based system, the major protections have extended to the surviving spouse (often only the widow), and decedents have been relatively free to disinherit their children. In recent years, there has been a great deal of criticism of even this limitation.⁸⁵ The argument is that the protection is not needed since very few decedents attempt to devise a substantial portion of their assets away from their families and that such a minor problem does not justify a limit on freedom of testation. Of course, the very existence of the legal restriction operates to discourage other testators from attempting to disinherit, and at the same time encourages the draftsman to counsel his client against trying to do so. Moreover, if only a small number of people would wish to deprive their families of a share of their estate, then the freedom of testation of most persons is not, as a practical matter, greatly limited.

Protection of the Spouse

Many United States jurisdictions employ a system of protection based on common law dower.⁸⁶ In a number of states, that has been replaced by enactment of "forced share" legislation or modified into "statutory dower."⁸⁷ Because such systems only protect the spouse from testamentary attempts to leave property to others and from inter vivos transfers of land, virtually all jurisdictions have had to deal with the problems of inter vivos transfers of other property which effectively defeat the statute. A number of different approaches have been developed, both judicially and statutorily.⁸⁸

The drafters of the U.P.C. rejected the argument that the protection of the surviving spouse was unnecessary⁸⁹ and enacted a complex, modern statute designed to allow free transfer of both

85. See, e.g., Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966); Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447 (1976).

86. ATKINSON, *supra* note 29, § 30.

87. *Id.*

88. For a full discussion of existing law in this area, see MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960).

89. U.P.C. General Comment to art. 2, pt. 2.

realty and personalty during the decedent's lifetime while protecting the surviving spouse.⁹⁰ The U.P.C. borrows from the Federal Estate Tax Law to cover a number of inter vivos transactions that are commonly referred to as "will substitutes," as well as providing a share of the probate estate for the surviving spouse.⁹¹

The U.P.C. provides that a surviving spouse may elect one-third of the "augmented estate."⁹² The augmented estate, as defined by the Code, is the probate estate less expenses of the funeral and administration, all family allowances, and all enforceable claims, plus the value of certain inter vivos transfers made by the decedent.⁹³ These transfers are in essence "will substitutes" and include any transfer in which the decedent reserved a life interest, the power to revoke, or a right of survivorship, and also certain "in contemplation of death" transfers unless the spouse agreed to the transfers. The augmented estate also includes any property which the surviving spouse received from the decedent.⁹⁴ In calculating the elective share, the spouse is credited with the value of the property received from the decedent.⁹⁵ This provision has the net effect of reducing the elective share of the spouse since any property already derived from the decedent is later charged against the elective share. It is designed to remedy another problem rarely dealt with by current protective schemes—election against the will by a spouse who has already received substantial assets in non-probate transfers.

Procedurally, the U.P.C. requires the surviving spouse who wishes to elect against the will to file a petition to do so within nine months of the decedent's death or six months after probate of the will, whichever is later.⁹⁶ The right of election is personal and may not be exercised by the spouse's personal representative.⁹⁷ The court may exercise the election for an incompetent spouse.⁹⁸ The right of election may be waived, as may the surviving spouse's

90. For a full discussion of the augmented estate concept, see Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

91. U.P.C. § 2-202, Comment.

92. *Id.* § 2-201(a).

93. *Id.* § 2-202.

94. *Id.* § 2-202(2).

95. *Id.* § 2-202, Comment.

96. *Id.* § 2-205(a).

97. *Id.* § 2-203.

98. *Id.*

homestead, exempt property, and family allowance. Waivers may be made before or after marriage.⁹⁹

The elective share of the surviving spouse is first taken from interests which have passed to the spouse or were renounced by the spouse.¹⁰⁰ (A life estate or the right to income from a trust is valued at one-half of the total value of the property unless contrary values are established by proof.)¹⁰¹ Equitable apportionment is applied to the remainder of the augmented estate.¹⁰² Any person who is required to contribute to make up the elective share may either give up the property transferred or pay its value.¹⁰³

The U.P.C. also provides for the "omitted" spouse.¹⁰⁴ If the will does not provide for a spouse who married the decedent after the will's execution, the spouse is entitled to the share he or she would have received under the intestate laws, unless it appears from the will that the omission was intentional or unless the testator provided for the spouse outside the will and intended this transfer to be in lieu of a provision in the will.¹⁰⁵ This provision was added because the U.P.C. does not provide that a subsequent marriage revokes a will and because the drafters felt that the average testator would prefer the spouse married after the execution of the will to take the larger intestate share rather than the elective share.¹⁰⁶

The U.P.C. approach is at great variance with Arkansas's system of statutory dower. The Arkansas scheme differs only slightly from the common law scheme devised in medieval England.

A widow may elect against her husband's will to receive her "dower."¹⁰⁷ As discussed above in the section on intestacy, dower will vary according to these factors: the nature of the property (land or personal property), the existence of descendants of the husband, and the source of the property. In the situation where there are surviving descendants of the husband, the wife will receive an absolute interest in one-third of his personalty and a life estate in one-third of his land. Where there are no descendants,

99. *Id.* § 2-204.

100. *Id.* § 2-207(a).

101. *Id.*

102. *Id.* § 2-207(b).

103. *Id.* § 2-207(c).

104. *Id.* § 2-301.

105. *Id.*

106. *Id.*, Comment.

107. ARK. STAT. ANN. § 60-501(a) (1971).

her share increases to one-half of personalty absolutely, one-half of "new acquisitions" in fee, and one-third of "ancestral property" for life.¹⁰⁸

While dower is designed to give the widow a nonbarrable share of her husband's property, it provides protection against inter vivos transfers of land only. Personal property of the husband may be transferred without the wife's consent, as dower attaches only to personal property which the husband owns at death.¹⁰⁹ Dower in real estate is an "inchoate" right during the husband's life, and the widow receives dower in all lands which her husband owned during marriage unless she consented to the transfer.¹¹⁰ In the case of *Richards v. Worthen Bank & Trust Co.*¹¹¹ the Arkansas Supreme Court indicated that any inter vivos transfer of personal property challenged by a surviving spouse would be voided if it was made in "fraud" of the widow's rights.

The election procedure provides for notice by the clerk of court of the right to elect within one month of the admission of the will to probate; the spouse must file the election, in the form specified by the statute, within one month after the expiration of the time for filing claims.¹¹² As in the U.P.C., the right of election is personal and does not survive the spouse's death. The guardian of an incompetent surviving spouse may exercise the election, but must be authorized to do so by the court.¹¹³

There are no testamentary limitations on the right of a wife to deprive her husband of a share of her property. He may elect against her will only if it was written before their marriage.¹¹⁴ When the husband does elect, the curtesy rights, like a widow's dower rights, will vary according to the nature of the property, its source, and the existence of descendants of the wife.

The contrast between the U.P.C. and Arkansas law in regard to the elective share of the surviving spouse is enormous. Arkansas law protects only the widow, where the U.P.C. applies to both a surviving wife or husband. Arkansas relies on a modification of common law dower, in which the surviving spouse's rights will vary

108. *Id.* §§ 61-201, -202.

109. *Id.* § 61-202.

110. *Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908).

111. 261 Ark. 890, 552 S.W.2d 228 (1977).

112. ARK. STAT. ANN. §§ 60-502, -503 (1971).

113. *Id.* § 60-505.

114. *Id.* § 60-501.

depending on whether the property is real or personal, the presence of descendants of the decedent, and the source of the property. The U.P.C. relies instead on a system in which the surviving spouse receives a one-third share of all property, real or personal, of the decedent. Moreover, it seeks to guarantee that the share cannot be defeated by inter vivos transfer by including most common will substitutes in the "augmented estate" and by computing the surviving spouse's share from this "augmented" estate.

Few arguments—other than tradition—can be made for Arkansas's current system. Although it is designed to provide a minimum share to the widow, it can be defeated by inter vivos transfers of personalty. Dower may have been an effective method of protection in an earlier society, but today, when personal property is the main form of wealth, it is inadequate.¹¹⁵ Moreover, the system differentiates in the inheritance of property on grounds like the source of the property and its nature as real or personal property which are not relevant today. It also creates a system which treats men and women differently. The wisdom of such a scheme in a society in which women frequently contribute substantially to family support is questionable. More importantly, such a scheme is arguably unconstitutional after the United States Supreme Court decision which held that Alabama laws which provided only for alimony from husbands to wives and not from wives to husbands violated the fourteenth amendment.¹¹⁶

The U.P.C. provisions are complex and represent a major change in the elective share system existing in most American jurisdictions. However, the U.P.C. solves the biggest problem, how to handle nonprobate transfers, which typically arises in the administration of such systems. Arkansas's law within this area is clearly in need of revision, and the Code scheme is a comprehensive and fair means to protect the surviving spouse.

Protection of Issue

U.P.C. § 2-302

Ark. § 60-507

115. Wright, *supra* note 40.

116. Orr v. Orr, 440 U.S. 268 (1979). In fact, such a challenge was made in the case, *In re Estate of Jack Hawkins, Deceased*, No. 65085 in the Probate Court of Pulaski County. The challenge, made by the beneficiary of the decedent's will who challenged the surviving wife's right to elect against it to receive dower, failed on the grounds that the beneficiary lacked standing.

While the common-law jurisdictions of the United States all theoretically permit disinheritance of children,¹¹⁷ the enactment of "pretermitted" heir statutes in fact provide some protection for children of a decedent. Such statutes theoretically protect only against "unintentional" disinheritance, but applications often lead to protection in cases where disinheritance was in fact intended.

Both the U.P.C. and Arkansas include such statutes, but they differ substantially. The U.P.C. protects only children born or adopted after the execution of the will, which allows the disinheritance of children existing at the time of execution simply by omission. Even after-born children will not be "pretermitted" under the U.P.C. if the will evidences an intention to omit them. Moreover, it does not operate when the other parent of the omitted child was left "substantially all" of the estate while other children of the marriage were living. This would mean that if a husband wrote a will leaving all his property to his wife while the couple had two children, a third child could not claim as a pretermitted heir. Finally, the statute does not protect the omitted child when he has received nonprobate assets "intended . . . to be in lieu of testamentary transfers."

Arkansas has a more traditional statute. It applies not only to children born or adopted after the execution of the will but also to any child or the issue of any deceased child living at the time of execution who is not mentioned either by name or as a member of a class. The law is absolute, despite the fact that it is rather unlikely that a testator who omits a child in fact does not intend to do so.¹¹⁸ Under Arkansas law, as under the U.P.C., the "pretermitted" child or grandchild will receive his or her intestate share.¹¹⁹

The U.P.C. provision is preferable, if one accepts the proposition that these statutes are intended to be intent-supplementing rather than protective devices. In particular, the provision that an after-born child may not claim his intestate share if his parent's

117. ATKINSON, *supra* note 29, § 36. Louisiana law restricts the right of a parent to disinherit his children. A certain percentage of the estate, depending on the number of children who survive the decedent, must be left to them unless one of ten specific grounds for disinheritance can be proved. LA. CIV. CODE ANN. arts. 1493-1494, 1617-1622 (West 1952 & Cum. Supp. 1979).

118. *Armstrong v. Butler*, 262 Ark. 31, 39, 553 S.W.2d 453, 458 (1977) in which the court states, "Our statute (§ 60-507) is of the 'Missouri type' which operates in favor of the pretermitted child without regard to the real intention of the testator in regard to the omission."

119. U.P.C. § 2-302; ARK. STAT. ANN. § 60-507 (1971).

will, written before his birth but after the birth of a child of the marriage, left "substantially all" of the estate to the surviving parent is important. This is a typical estate plan in a small or medium sized estate, especially where there are minor children, and the law should not be written to upset it. Even though any lawyer drafting a will should not fall into this trap, it is preferable not to set it for the layman. It is possible that the provision that an after-born child may not claim his intestate share if the will evidences an intention to omit him may give rise to litigation in some cases. Nevertheless, it seems preferable to seek to ascertain the testator's intent than simply to ignore it.

The U.P.C. also provides for the presumably rare case in which a parent omits a child from his will because he believes the child is dead.¹²⁰ In that case, the child takes an intestate share. Under current Arkansas law, of course, such a child would be "pretermitted," and entitled to his or her elective share.

Allowances and Exempt Property

1. *Homestead*

U.P.C. § 2-401

Ark. § 62-602; ARK. CONST. art. 9, §§ 4-6, 10

The U.P.C. provides that the surviving spouse (and, if there is no spouse, the minor and dependent children of the decedent) will receive a homestead allowance of \$5000. This share is in addition to any intestate share or elective share, and also to any testamentary share, unless the will provides otherwise. Additionally, it is exempt from all claims against the estate.¹²¹

Arkansas grants homestead rights under the state constitution.¹²² Homestead rights may be claimed by a widow and/or minor children only. The constitution limits the homestead to 160 acres, provided the value does not exceed \$2500, or to eighty acres without regard to value, if the homestead is located "outside any city,

120. U.P.C. § 2-302(d).

121. *Id.* § 2-401.

122. A proposed new constitution, which contained some minor changes in the homestead provision and which extended the homestead provision to surviving spouses of either sex, was defeated November 4, 1980. The same constitutional questions which are raised by the dower statutes exist with regard to homestead, also. The constitutionality of the current homestead provision was also raised in *Estate of Jack Hawkins, Deceased*, see note 116, *supra*.

town, or village;" and to one acre, provided the value does not exceed \$2500, or to one-fourth acre without regard to value, if the homestead is in a "city, town, or village." The widow and/or minor children are entitled to occupy the land and to receive any rents and profits on it during the life of the widow or the minority of the children.¹²³

While the Arkansas provision may result in the awarding of a very valuable right to the widow, it is not well adapted to modern circumstances. It exists only if there is real property upon which the family resides in the husband's estate, and if it has not been waived. It is therefore inapplicable where the family occupied rental property, or where they occupied mortgaged property if (as is usually the case) homestead was waived. Additionally, the widow cannot sell her homestead rights if she desires to live elsewhere.¹²⁴ Therefore, many families will not benefit from the allowance. The U.P.C. provision, on the other hand, is applicable to every one, since it simply provides for a cash payment.

2. *Exempt Property*

U.P.C. § 2-402

Ark. § 62-2501

In addition to the homestead allowance, the U.P.C. grants the surviving spouse \$3500 (in excess of any security interests) in furniture, automobiles, "furnishings," appliances and personal effects. If there is no surviving spouse, the decedent's children receive the same value. Where there is not \$3500 of such property, the beneficiaries will receive other property up to the \$3500 value. Like the homestead allowance, this exempt property allowance is in addition to any intestate or elective share and also in addition to any testamentary gift unless the will provides otherwise. This allowance takes priority over all claims except homestead and family allowance.¹²⁵

Arkansas grants the widow the right to \$2000 of personal property of the decedent, to be selected by her from the estate. (The value is reduced to \$1000 if the estate is insolvent.) If there is no widow, the minor children of the decedent receive this property. And, if the decedent is survived by a widow and by one or more

123. ARK. CONST. art. 9, §§ 4-6, 10.

124. *Gibson v. Gibson*, 264 Ark. 420, 572 S.W.2d 148 (1976).

125. U.P.C. § 2-402.

children who are not children of the widow, this allowance goes one-half to the widow and one-half, in equal shares, to the decedent's minor children.¹²⁶

In addition to this property, a widow is entitled to "such furniture, furnishings, appliances, implements, and equipment" as is necessary to the use and occupancy of the dwelling, provided the widow was living with her husband at the time of his death. This provision takes priority over claims by heirs and creditors.¹²⁷

The major difference in the two provisions is the larger amount of exempt property which the U.P.C. grants. However, because of the provisions allowing the widow "such furniture, furnishings, appliances, implements, and equipment," the Arkansas statute may sometimes result in a larger allowance. The U.P.C. provides for a uniform allowance for all families and allows selection of the full amount of the exempt property. Additionally, the granting of this property to the decedent's children in the absence of a surviving spouse may be significant, but only when the estate is insolvent, since in the absence of a surviving spouse, the children would be the only heirs and are likely to be the major legatees if there is a will.

3. *Family Allowances*

U.P.C. §§ 2-403; 2-404

Ark. §§ 52-2501(c); 62-2501.1 to -.3; 62-2502

The U.P.C. provides for payment of allowances for living expenses to a surviving spouse and to minor and dependent children of the decedent during the period of administration. These payments take priority over all claims against the estate except the homestead allowance, but allowances cannot be paid beyond one year if the estate is insufficient to pay all claims. There is no monetary limit on these payments; they are to be allowed by the personal representative in a "reasonable" amount.¹²⁸ The comments indicate that the amount of the allowance should be determined by reference to the family's standard of living and the availability of other resources for their support.¹²⁹ The amounts paid under this

126. ARK. STAT. ANN. § 62-2501(a) (1971).

127. *Id.* § 62-2501(b).

128. U.P.C. § 2-403; however, the personal representative may allow no more than \$6000 (or \$500 per month for 12 months) without court approval. *Id.* § 2-404.

129. *Id.* § 2-403, Comment.

section are not charged against any intestate or elective share, nor are they charged against a testamentary share unless the will provides otherwise.¹³⁰

While current Arkansas law provides for the payment of allowances for the family of the decedent, the payments are limited to \$500 and are payable only in the first two months after the death of the decedent. Moreover, as in other allowance provisions, this payment is available only to a widow and minor children.¹³¹ Clearly these amounts and the time limitation will very often be insufficient. Additionally, a widower or a dependent child above the age of majority is not eligible for allowance.

Arkansas provides several other types of allowance to a decedent's family: the widow "may tarry in the mansion or chief dwelling house of her husband" for two months without paying rent, and during this time "she shall have a reasonable sustenance" from the husband's estate.¹³² If the widow's dower is not assigned during this two month quarantine period, she is entitled to continue to remain in the "mansion or chief dwelling house . . . together with the farm thereto attached" until her dower is assigned.¹³³ Moreover, until the assignment of dower, she is entitled to be awarded that part of the rent of the real estate, in proportion to her interest in it.¹³⁴ These three sections survive from an earlier statute and are not part of the Probate Code.¹³⁵ While these sections were not repealed, and one could therefore argue that they are cumulative with all other provisions for allowances, they are apparently rarely used. Only one case construing this statute has been decided since 1926, *Price v. Price*,¹³⁶ in which the Arkansas Supreme Court determined that the quarantine rights of the widow do not extend to lands attached to the mansion which are used for other than farm purposes.

Current Arkansas law also provides for payments from the estate to minor distributees during the course of administration. These payments, however, may be made only where the estate is solvent, and any such payment is to be deducted from the share of

130. *Id.* § 2-403.

131. ARK. STAT. ANN. § 62-2501(c) (1971).

132. *Id.* § 62-2501.1.

133. *Id.* § 62-2501.2.

134. *Id.* § 62-2501.3.

135. *Id.* § 62-2501.1 to -.3, Compiler's notes.

136. 253 Ark. 1124, 491 S.W.2d 793 (1973).

such distributee.¹³⁷

The U.P.C. provisions for allowances are certainly more realistic than Arkansas's in light of current economic realities. Enactment of the U.P.C. would make the allowance meaningful to a surviving spouse or children. At the same time, the repeal of the obsolete Arkansas statutes providing for quarantine would prevent any litigation concerning their continued validity.

TESTAMENTARY DISPOSITION

Both Arkansas and the U.P.C. provide for attested wills and holographic wills; neither permits an oral or nuncupative will. Both have identical sections setting the minimum age for making a will at eighteen. There the similarity ceases.

Attested Wills

U.P.C. § 2-502

Ark. § 60-403

All wills statutes require certain formalities for execution of attested wills.¹³⁸ The requirement serves several purposes: (1) the formalities, particularly witnessing, are supposed to prevent "fraud" and to minimize influence by beneficiaries; (2) the formal process should impress the testator with the serious legal consequences of the act; and (3) compliance with the statute provides certainty as to validity of the transaction. The basic problem, however, lies with the nature of will transactions. Unlike the legislative process, where regularized procedures in the enactment of statutes or promulgation of regulations are familiar to the people involved and where law-trained personnel are involved in the whole process, wills can be prepared and executed without legal advice. So long as the statute does not require preparation by a lawyer, some attested wills are bound to be prepared by lay persons. "Will kits" can be purchased; books advocate do-it-yourself wills.¹³⁹ The issue then

137. ARK. STAT. ANN. § 62-2502 (1971).

138. See 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.4 (3d ed. rev. 1960) [hereinafter cited as PAGE]. Several recent articles are Chaffin, *Execution, Revocation, and Revalidation of Wills: A Critique of Existing Statutory Formalities*, 11 GA. L. REV. 297 (1977) (comparing Georgia statutes with the U.P.C.); Nelson & Starck, *Formalities and Formalism: A Critical Look at the Execution of Wills*, 6 PEPPERDINE L. REV. 331 (1979).

139. The most famous is N. Dacey, *How to Avoid Probate* (2d ed. 1979). Compare Ashley, *YOU AND YOUR WILL* (1975) and *Teach Your Wife How to Be a Widow* (Joseph Newman ed. 1973). Both of the latter advocate use of a carefully selected lawyer.

becomes how complex the formalities imposed by law should be. The formalities may be made so complex and difficult that testators will be discouraged from drawing their own wills. While there is much to be said for such a policy, it is likely to be more popular with lawyers than with the public.¹⁴⁰ The contrary legislative policy is already expressed in the provision for holographs. Hence formalities ought to be designed to provide safeguards, but not to strike down documents obviously intended to have legal effect. The present Arkansas statute on execution of attested wills imposes maximum formalities:

- (1) the testator must declare to the attesting witnesses that the instrument is his will ("publication");
- (2) he must sign in the presence of two witnesses or acknowledge his prior signature to them (a proxy signature is permitted under rigid restrictions);
- (3) the signature must be at the end of the will;¹⁴¹
- (4) the testator must request the witnesses to sign;
- (5) the witnesses must sign in the presence of the testator (although not necessarily in the presence of each other).¹⁴²

By way of contrast the U.P.C. provides a minimum of formalities:

- (1) the testator must sign the will; if it is signed for him, the signature must be made in his presence and at his express direction;

140. See Wellman, *Arkansas and the Uniform Probate Code: Some Issues and Answers*, 2 UALR L. J. 1, 15 (1979):

What lawyers usually fail to perceive, possibly because of conflicting interests in the fees that come from assisting persons with wills, is that the public plainly insists on being permitted to use a "do-it-yourself" approach to will making, as is permitted in virtually every other enterprise. Further, the legal profession should note its relatively low status in polls showing consumer confidence and respect for various professions and callings. If there is concern for upgrading the image of the profession, it may be beneficial to take a close look at rules that appear to force the public to rely on lawyers. If holographic wills prove to be a source of trouble and litigation, it will become obvious to the consuming public that lawyers have valuable training and experience to offer prospective testators.

141. The Arkansas Supreme Court has on occasion been liberal in finding that the signature is at the "end." See *Weems v. Smith*, 218 Ark. 554, 237 S.W.2d 880 (1951) (where the concluding words of the last sentence of the will followed testator's signature).

142. Although the Arkansas statute expressly requires that the witnesses sign "at the request of the testator," the Arkansas Supreme Court has adopted a praiseworthy policy of liberal construction and has held that there need not be a specific request when the witnesses sign in the presence of the testator. *Hanel v. Springle*, 237 Ark. 356, 372 S.W.2d 822 (1963). This case indeed supports Professor Langbein's substantial compliance theory. See note 143 *infra*.

- (2) the testator does not have to sign in the presence of the witnesses; if he has previously signed, he must acknowledge to the witnesses that the signature is his or that the document is his will;
- (3) he does not have to "publish" the will, *i.e.*, declare the document to be his will;
- (4) the witnesses must sign but are not required to sign in the testator's presence, nor in the presence of each other;
- (5) the statutory language does not explicitly require that the testator request the witnesses to sign.

While these appear to be "bare bones" formalities, they provide considerable protection against fraud or forgery, probably as adequately as the more elaborate formalities of the present Arkansas statutes. This is always a matter of degree: one more witness is always better than the statutory requirement of two, for example. True, a person may acknowledge to two persons that the signature on a paper is his signature, and may have signed the paper in the mistaken belief that it was a legal paper other than a will. On the other hand, consider the number of cases where the testator believes he has done everything necessary to have a valid will, yet has fallen short because he has not observed one of the formal requirements. In one unreported case the lawyer took a will to the hospital to have the will executed by his client; the lawyer was supposed to have signed as one of the witnesses, but somehow overlooked signing at the time; he later signed the will when he was back at his office out of the presence of the testator. The will was denied probate. Yet who could doubt what the testator wanted and believed he had accomplished? If the courts in probate were willing to adopt a doctrine of "substantial compliance," as they do for the Statute of Frauds, the more stringent statute would be less objectionable.¹⁴³ However, the solution ought not be left to uncertain treatment by the courts, but rather ought to be reached at the legislative stage by setting minimum standards which afford protection without thwarting intent.

Experience under the U.P.C. indicates that relaxation of the formalities has not led to widespread change in execution of at-

143. The U.P.C. attempts to simplify formalities. Another approach has been advocated by Professor John H. Langbein: sustaining wills which technically do not comply but which meet a "substantial compliance" test. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975); Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A.J. 1192 (1979).

tested wills. Lawyers continue to execute wills with maximum formality; they know the client may change his domicile before he dies or may acquire real property in a non-U.P.C. state, so that the law of other states may govern the validity of the will. In fact, because the U.P.C. permits an additional optional formality which prevents later contest on grounds of execution, the lawyer-guided will often is more formal. This is the "self-proved" will, one as to which the testator and the witnesses have formally acknowledged the execution before a notary or other official authorized to give an oath.¹⁴⁴ Not only is no other proof of execution required at time of probate, the self-proving affidavit cannot be contradicted as to facts of execution in event of contest (except, of course, in the rare case of a forgery and impersonation before the notary).¹⁴⁵ A self-proved will can still be contested on grounds of lack of capacity, undue influence, fraud or the like.

Holographs

U.P.C. § 2-503

Ark. § 60-404

Arkansas already permits holographic wills. The major substantive difference is that Arkansas now requires "the entire body of the will" to be in the testator's handwriting, whereas the U.P.C. requires "the material provisions" to be handwritten. If the testator used a printed form will with the opening ("exordium") clause and a revocation clause printed, the Arkansas statute would seem to invalidate the will even though the material provisions and the signature were all in the testator's handwriting. It is, of course, possible that the Arkansas courts could ignore the printed matter and hold only the rest to be the "body" of the will.¹⁴⁶

The Arkansas statute contains a proof requirement which is not in the U.P.C., namely that the handwriting and signature be established by the testimony of three witnesses. Section 3-303 of the U.P.C. would permit the will to be probated informally on the basis of a sworn statement or affidavit of one witness; in a formal

144. U.P.C. § 2-504. Cf. ARK. STAT. ANN. § 60-417 (1971) (allowing use of an affidavit by the attesting witness in lieu of direct testimony, but only in an uncontested probate).

145. U.P.C. § 3-406(b).

146. Courts in several jurisdictions treat the printed material as "surplusage." See Annot., 89 A.L.R.2d 1198 (1963); ATKINSON, *supra* note 29, § 75. 2 PAGE, *supra* note 138, § 20.5.

testacy proceeding the amount of proof depends on whether the probate is contested. If all the heirs agree that the holograph is valid, it seems superfluous to require more than one witness. Thus, if there is no contest, under Section 3-405 of the U.P.C. the court may allow probate on the basis of the sworn petition alone. If there is doubt about the handwriting, a contest is likely and expert testimony will probably be obtained anyway.

Neither statute requires that the holograph be dated, or that the signature be at the end.¹⁴⁷

Competence of Witness

U.P.C. § 2-505

Ark. § 60-402

There are substantial differences between the U.P.C. and the present Arkansas statute. For one, Arkansas places a minimum age of eighteen on the competence of the witness to an attested will. The U.P.C. allows use of younger persons if they are competent generally to testify in court. The major difference lies in the use of a devisee under the will as a witness. Under both statutes the will is not invalidated. However, under the Arkansas statute the witness will forfeit the part of his devise which exceeds his intestate share, unless he is a supernumerary witness.¹⁴⁸ Under the U.P.C. there is no forfeiture, although the use of the interested witness may be a factor if the will is challenged on grounds of lack of capacity or undue influence. The unfairness of the Arkansas statute is illustrated by the following hypothetical: Testator has a prior valid will disinheriting one son and leaving all his estate to his daughter; later he executes a second will, witnessed by the daughter and one other person, which devises a one-fourth interest to the son and three-fourths to the daughter; the daughter will forfeit one-fourth which would then pass intestate.

147. Where the testator's name appears in the body of a holograph but not at the end, there is an issue as to whether the testator intended this as his signature. *Compare* Nelson v. Texarkana Hist. Soc'y & Museum, 257 Ark. 394, 516 S.W.2d 882 (1974) (not a signature) with Smith v. MacDonald, 252 Ark. 931, 481 S.W.2d 741 (1972) (will allowed). The Arkansas court is liberal in admitting evidence of testator's declarations and the surrounding circumstances on this issue.

148. Note that the spouse of a devisee may be an attesting witness under the Arkansas statute. *Rockafellow v. Rockafellow*, 192 Ark. 563, 93 S.W.2d 321 (1936).

Choice of Law as to Execution

U.P.C. § 2-506

Ark. § 60-405

Both statutes provide for a choice of law, but the U.P.C. is broader. The U.P.C. applies to a will executed *within* the state by a testator in accordance with the law of his domicile. Suppose, for example, a non-resident of Arkansas is visiting in Arkansas and acquires realty here; he decides he needs a will and prepares one himself in compliance with the law of his home state with which he is familiar; the will would be valid under the U.P.C. but apparently invalid under the Arkansas statute. No reason can be given for such a rule; Arkansas would recognize the will as valid if executed in any other state. Hopefully, if the testator had gone to an Arkansas lawyer and explained that the domicile was in another state, the lawyer would comply with both Arkansas law and the law of the state of domicile.

The U.P.C. offers some additional choices for rare situations. The foreign national might execute a will in accordance with the law of the nation of which he is a citizen (*e.g.*, Mexico). If he executes it while residing in the United States and the execution does not comply with local law, Arkansas would not recognize the will as valid, whereas the U.P.C. would. Likewise a person domiciled in one state who plans to move to another state might follow the law of the second state. If his residence is in the second state at death, the will would be valid under the U.P.C. whether or not it complied with the law of the place of execution or of domicile at the time of execution.

Revocation by Subsequent Will or Act

U.P.C. § 2-507

Ark. § 60-406

Of all the U.P.C. provisions considered in this article, the section on revocation is the least innovative. In fact it makes no change at all in the basic wording utilized in most American states.¹⁴⁹

The section permits revocation by a subsequent will which expressly revokes or is inconsistent with the prior will. "Will" is defined in U.P.C. Section 1-201(48) to include a testamentary instru-

149. See generally ATKINSON, *supra* note 29, § 87; 2 PAGE, *supra* note 138, § 21.4.

ment which merely revokes a prior will. Hence there is no need for the additional provision found in some statutes providing for revocation by a writing clearly indicating an intention to revoke. Although U.P.C. Section 2-507 says nothing about the formalities of execution of the subsequent will, U.P.C. Section 2-502 applies to "every will" for purposes of validity and obviously governs the revoking document.

Can a holograph revoke an attested will? Clearly the answer is affirmative.¹⁵⁰ Nothing in the U.P.C. would indicate a different answer. A holograph is just as valid as an attested will; it is not a "second class" testamentary document, although it may often be viewed that way by practicing lawyers. Lawyers who have prepared an attested will and guided its execution by the client would like to believe the will should only be changed by a subsequent attested will (hopefully prepared by the same lawyer who drafted the first will). Nothing has ever prevented a client from tearing up the original attested will, thereby revoking it. The testator is clearly, then, free to execute a holographic will to replace the attested will. Why should he not be able to revoke by the express language of a holograph alone? (It provides more reliable proof of intent to revoke than the absence of an original attested will, which without more raises a presumption that the testator who had possession of the will destroyed it and did so with intent to revoke.)

The present Arkansas section, adopted in 1979, is identical to the U.P.C. except for the addition of the last sentence, which seems to be superfluous. (If only part of the will had been revoked, the remainder obviously is unrevoked and still valid.) The 1979 change was brought about by an unusual opinion of the Arkansas Supreme Court in which there was dicta that a subsequent will automatically revoked a prior will even though the subsequent will contained no revocation clause.¹⁵¹

Two judicial doctrines are left untouched by both the U.P.C. and the Arkansas statute: the presumption that the will has been revoked if it was in the testator's possession and is apparently missing at the time of his death,¹⁵² and the doctrine of dependent relative revocation.¹⁵³ The court is free to mold those doctrines to

150. *Smith v. Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957).

151. *Parker v. Mobley*, 264 Ark. 805, 806, 577 S.W.2d 583, 584 (1979).

152. *Garrett v. Butler*, 229 Ark. 653, 317 S.W.2d 283 (1958); *Porter v. Sheffield*, 212 Ark. 1015, 208 S.W.2d 999 (1948).

153. The writer of Note, *Wills-Dependent Relative Revocation*, 8 ARK. L. REV. 193

achieve a just result on the individual facts. A will which was in the testator's possession and is not found after his death is presumed to have been destroyed by the testator with the intent of revoking it. However, the missing will may have been destroyed by another person before or after the testator's death, it may have been destroyed by accident, or it may simply be lost; in these cases it is not revoked. The presumption of revocation can be rebutted by testimony that the will was seen after testator's death, or by evidence that others had access to the will and no reason can be shown why testator would have wanted the will revoked, or by statements of testator shortly before his death indicating that the will was still in effect. In these cases it is necessary to prove the contents of the will. Arkansas presently has a statute to govern proof of the lost or destroyed will, assuming the will is not revoked.¹⁵⁴ Unfortunately, the statute's wording has substantive content. It provides that no will shall be allowed unless it is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator. If the will was accidentally destroyed in the lifetime of the testator or destroyed by someone at the testator's request but not in his presence, the statute literally bars proof of the will, although it is not revoked and therefore should be a valid will entitled to probate. The U.P.C. contains no comparable provision and has no section governing proof of a lost or destroyed will which has not been properly revoked,¹⁵⁵ although the U.P.C. does require

(1954) erroneously suggested that ARK. STAT. ANN. § 60-408 "may" prohibit use of dependent relative revocation. That section deals with revival. Dependent relative revocation is a completely different doctrine. *Walpole v. Lewis*, 254 Ark. 89, 492 S.W.2d 410 (1973) may espouse a subtle and limited form of the doctrine. Where the testator has crossed out part of a clause and attempted thereby a different disposition, which is invalid, the original will is probated without partial revocation.

154. ARK. STAT. ANN. § 60-304 (1971) provides:

No will of any testator shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions be clearly and distinctly proved by at least two [2] witnesses, a correct copy or draft being deemed equivalent to one [1] witness.

155. Absence of such a provision may raise unnecessary questions. See *In re Estate of Hartman*, 172 Mont. 225, 563 P.2d 569 (1977) (U.P.C. adopted in Montana, prior section on lost wills repealed). The Arizona Probate Code, based on the U.P.C., added a section to govern proof of the lost or fraudulently destroyed will; ARIZ. REV. STAT. ANN. § 14-3415 reads:

If the original will, or an authenticated copy of the will as probated in another

probate of such a will be a formal proceeding. Normally, the best proof of the contents of a lost or destroyed will would be a copy of the will with testimony of either the draftsman or one of the witnesses that the copy is a true and accurate copy of the original will as executed by the testator. Even without a specific proof section such as the one in Arkansas, no court will probate a will if the contents cannot be established by clear evidence.

Revocation by Change in Circumstances

U.P.C. § 2-508

Ark. § 60-407

The basic rule underlying the above sections is the same. Divorce revokes provisions of a will in favor of the divorced spouse. In both the U.P.C. section and the Arkansas section, marriage after execution of the will¹⁵⁶ and birth of issue after execution of the will are not treated as revocation. Under the U.P.C. the later spouse and issue are given a statutory share as pretermitted heirs and under the Arkansas statute the later spouse is protected by an elective share and the later born child is entitled to a statutory share.¹⁵⁷ Divorce is, therefore, the only subsequent event which revokes provisions of a prior will.

The U.P.C., however, contains a more carefully drawn provision. Under the Arkansas statute the following situations are left for litigation:

- (1) is nomination of the spouse for appointment as executor a "provision" in favor of the spouse or is it unaffected by the divorce?
- (2) is the creation or exercise of a power of appointment in favor of the spouse a "provision" which is revoked if there is a divorce?
- (3) what if the marriage is annulled, instead of the parties obtaining a divorce?
- (4) if the will contains an alternative gift if the spouse "predeceases me," does that gift operate when there is a divorce?

jurisdiction, is not available, the contents of the will can be proved by a copy of the will and testimony of at least one credible witness that the copy is a true copy of the original. If a copy of the will is unavailable, contents of the will can be proved only by clear and convincing proof. A witness need not be an attesting witness to the will. If the missing will is allowed for probate, the order of the court shall set forth the contents of the will as found by the court.

156. *Lamb v. Ford*, 239 Ark. 339, 389 S.W.2d 419 (1965).

157. *ARK. STAT. ANN. § 60-507* (1971).

(5) if the testator remarries the divorced spouse and is still married at the time of death, are the provisions for the spouse effective despite the intervening divorce?

(6) if the will was drawn in anticipation of the divorce and made express provision for the spouse "even if we are no longer married," is the divorce nevertheless a revocation?

The uncertainty of the answers to these questions, which are certain to arise and cause expensive litigation, is adequate reason to prefer the U.P.C. section.

Revival

U.P.C. § 2-509

Ark. § 60-408

When a testator has executed two wills, the latter expressly or by inconsistency revoking the former, and still later the testator destroys the second will and retains the first will intact, should the first will be probated? This is a problem of "revival" and various rules have been formulated to deal with it.¹⁵⁸ The English common-law courts took the position that the second will took effect only at the death of the testator and did not revoke the prior will until then; hence upon destruction of the second will, the first will remained unrevoked. Although the ecclesiastical courts held that the first will was revoked when the testator executed his later will, these courts permitted evidence to establish that the testator intended to "revive" the first will. A number of American states, including Arkansas, follow the early New York statute which required "reexecution" (without defining what that means). In any state a still later third will or codicil may "republish" the first will by reference to it and in effect revive it.

The U.P.C. adopts the ecclesiastical rule, permitting revival if that is shown to be the testator's intent. For this purpose testimony is admissible to prove oral statements of the testator, whether made at the time of the destruction of the revoking will or at some later time, as to his intent. The U.P.C., if adopted, would therefore change the Arkansas law. The U.P.C. is preferable because it gives effect to the testator's intent. Although the U.P.C. contains no express provision for republication by codicil, that doctrine would remain applicable in a proper case.

158. See generally ATKINSON, *supra* note 29, § 92; 2 PAGE, *supra* note 138, §§ 21.49 to -56.

Parameters to the Statute of Wills

A number of provisions in the U.P.C. allow reference in the will to extrinsic documents and events, without requiring them to be set forth in full in the will itself. Some of these sections merely express doctrine which some courts have worked out judicially. The U.P.C. statutory sections are:

- 2-510—authorizing incorporation by reference,
- 2-511—embodying the Uniform Testamentary Additions to Trusts Act, permitting pour-over into living trusts or testamentary trusts under the will of another person,
- 2-512—permitting reference to acts or events which have significance apart from the will,
- 2-513—allowing the will to refer to a separate list disposing of tangible personal property.

In effect each of these recognizes that some of the details of property disposition can be outside the concept that the testator must express in a valid will, attested or holographic, the directions for succession to his property.

1. *Incorporation by Reference*

U.P.C. § 2-510

[No corresponding Arkansas statute.]

Courts are divided as to whether to permit incorporation by reference in the absence of statute.¹⁵⁹ Those courts which do recognize the doctrine often impose fairly strict limitations: (1) the document must be in existence when the will is executed, (2) it must be described as being in existence, (3) the writing must be described with reasonable accuracy, (4) the intent to incorporate it must appear in the will, and (5) the writing must fit the description in the will. The U.P.C. seems to adopt only (1), (3) and (4). For example, consider the following illustration. A testator provides in his will: "A list of stocks will be found attached to this will. I give said stocks to my daughter Elizabeth." After the testator's death, a list is found with the will, the list bears a date the same as the will and witnesses testify that the testator had attached it to the will when the will was executed. The gift would fail under traditional doctrine, but would be valid under the U.P.C.

159. ATKINSON, *supra* note 29, § 80; 2 PAGE, *supra* note 138, §§ 19.17 to -32. See Note, *Wills-Incorporation of Extrinsic Documents by Reference*, 6 ARK. L. REV. 496 (1952).

The adoption of the U.P.C. section would really make no change in Arkansas law; the Arkansas Supreme Court has adopted a judicial rule which approximates the U.P.C. statutory version.¹⁶⁰

2. *Testamentary Additions to Trusts*

U.P.C. § 2-511

Ark. § 60-601

Arkansas enacted the Uniform Testamentary Additions to Trusts Act in 1963. The purpose of the Act is to permit the testator by his will to add assets to an existing trust, without setting forth the entire terms of the trust in the will itself and without causing the assets already in the trust to be administered as part of the probate estate. The "pour-over" may be to:

- a revocable trust set up during lifetime by the testator or by some other person (such as a spouse or parent);
- a life insurance trust, funded or unfunded;
- an irrevocable trust in existence at the testator's death;
- a trust created under the will of another person who has predeceased the testator.

It is not necessary that the trust be established when the will is executed.

Need there be any assets in the trust? In the case of a revocable life insurance trust, the settlor may retain all incidents of ownership and the only "property" in the trust is the right to receive the proceeds under a designation of the trustee as beneficiary. Although creating a highly tenuous property interest at best, this procedure is expressly permitted. Suppose a trust agreement is executed but no assets are transferred into the trust; instead the trustee or a third person has a power of attorney to transfer assets into the trust. Clearly, there is no trust in existence in such a case until assets are transferred, but the statutory authorization for the devise to the named trustee should overcome the conceptual difficulty. As a precaution, most estate planners would probably transfer a nominal asset into the trust when the trust agreement is executed.

160. *Montgomery v. Blankenship*, 217 Ark. 357, 230 S.W.2d 51 (1950), noted in 6 ARK. L. REV. 496 (1952). The court allowed incorporation of a revocable living trust document.

3. *Events of Independent Significance*

U.P.C. § 2-512

[No corresponding Arkansas statute.]

Wills often dispose of property by reference to extrinsic facts. For example, it is not unusual to devise "my residence at the time of my death, and all the furniture and furnishings therein." Here the testator may change his residence between execution of the will and the time of his death; he may replace or add furniture from time to time. Or there may be a devise "to my son — or, if he predeceases me and leave no issue, to his widow." In this case the reference is to an extraneous event, the marriage of the son. The examples can be legion: "the contents of my safety deposit box," "my stamp collection," "all of my hunting and fishing equipment," "all stocks and bonds owned by me at my death," a devise to "the person who takes best care of me in my declining years," a devise "after the death of my said wife to those of our grandchildren who survive her," etc. These devises are upheld without statutory authorization,¹⁶¹ but the statute serves as a reminder of their validity and rounds out the concept of what must be included in the will itself.

4. *Separate List Disposing of Tangible Personal Property*

U.P.C. § 2-513

Ark. § 2-513

The Arkansas statute, taken from the U.P.C., was enacted in 1979. The U.P.C. provision is an innovation which was drafted in response to requests of practicing lawyers for a special exception to the Statute of Wills. Clients often want to dispose of personal belongings to friends and relatives and either have not thought out the details when their wills are prepared or want to be able to change the items or the devisees from time to time without going through the formalities of executing a codicil each time. The items may or may not have a great monetary value. The Code permits this practice with some safeguards: (1) the will itself must refer to the list and adequately describe it (such as "a separate list which will be found with this will"); (2) items specifically devised in the will itself cannot be changed by the list; (3) only tangible personal property not used in a trade or business can be disposed of by the

161. ATKINSON, *supra* note 29, § 81; 2 PAGE, *supra* note 138, § 19.34.

list (not money, promissory notes, stocks, or bonds, all of which are choses in action); (4) the list must either be in testator's handwriting or it must be signed by him. With those qualifications, the provision is broad: the list can be prepared after the will is drafted; it can be altered by the testator at any time. Note that a separate writing in the testator's handwriting and signed by him would be valid as a holograph and hence is not subject to the limitations imposed by U.P.C. section 2-513.

WILL CONSTRUCTION

The U.P.C. and the Arkansas statutes both contain a number of sections dealing with common problems of will construction: the effect of subsequent changes in specifically devised property (ademption), the effect of death of a devisee before the testator or other failure of a devise (lapse), the question of whether a specific devise passes subject to a lien or free of the lien (exoneration out of general assets), and the inclusion of after-acquired property. In general, the U.P.C. provides a more precise set of rules on these matters;¹⁶² it also provides rules on a variety of construction problems not presently covered by the Arkansas statutes. Although the order in which assets should be used to satisfy debts is commonly treated as a problem of distribution (abatement), it is properly one of construction and will be so considered for purposes of this article.

Although many of the statutory rules pertain to a "specific devise" (and "devise" is defined to mean a testamentary disposition of real or personal property, just as it is in section 62-2003 of the Arkansas Code), the U.P.C. does not define what a "specific devise" is. In most situations the intent to give specific property is clear from the terms of the will:

"I give my ten shares of AT&T stock"

"I give all of my AT&T stock"

"I give stock in AT&T evidenced by certificate No. xxxx"

Suppose, however, that testator's will simply reads:

"I give ten shares of AT&T stock"

162. Most of the U.P.C. sections on construction are accompanied by helpful Official Comments. For a general discussion of the U.P.C. rules of construction, see L. AVERILL, *UNIFORM PROBATE CODE IN A NUTSHELL* §§ 10.01 to -.07 (1978); 1 *UNIFORM PROBATE CODE PRACTICE MANUAL*, 147-65 (2d ed. 1977).

Testator owns at the time the will is executed ten shares of AT&T stock. Did he mean those specific shares or any ten shares (a general devise)? The U.P.C. leaves that determination to the court, as does the present Arkansas Code.¹⁶³

Applicable Law

U.P.C. § 2-602

[No comparable Arkansas statute.]

This section has no exact counterpart in Arkansas or indeed in any of the other non-U.P.C. states. The Official Comment to U.P.C. section 2-602 notes that New York, by legislative enactment, recognizes and enforces in its courts a provision in the will of a non-domiciliary that the law of New York should govern both real and personal property located there, and that Illinois has a similar statute. New York would not, however, under its statute necessarily apply the law of another state even if the testator directed it. U.P.C. section 2-602 requires just that. For example, assume a testator executes his will when he is a domiciliary of a particular state; he wants the will interpreted under the laws of that state and knows he may be domiciled or have his property situated elsewhere when he dies; his will expressly directs that it be construed under the law of the designated state. If at testator's death he is domiciled in a U.P.C. state or owns real property there, the courts of that state would give effect to the testamentary intent. The only limitation is that no public policy of the state be violated. Courts could reach the same result without a specific statute, if the Restatement is followed,¹⁶⁴ but courts are not likely to do so unless the issue is competently briefed and argued by counsel familiar with conflict of laws doctrine.

Intent of the Testator

U.P.C. § 2-603

[Although there is no separate statutory section, comparable wording is found in several of the Arkansas sections dealing with will construction: § 60-410; but compare § 60-409.]

The general principle embodied in the U.P.C. section is uni-

163. Cf. WIS. STAT. ANN. § 853.33 (West 1971) (requiring a gift of securities to be construed as specific in most cases).

164. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 240, 264 (1971).

versally accepted in the United States. The testator's intention controls in the construction of his will; that intention must be somehow expressed by the words in the will, not by oral statements of the testator as to what he meant.

The real purpose of this section of the U.P.C. is to affirm that all of the construction rules embodied in the succeeding sections are merely presumptions and yield if the testator expresses a different intent. That expression need not be explicit. It is enough if the intention is "indicated." Compare statutes which govern unless "a contrary intention is clearly expressed." The U.P.C. wording leaves room for the court to arrive at the actual intent of the testator if there is some wording in the will from which to arrive at that intent. But the intent must be indicated "by the will." U.P.C. section 2-603 does not open the door to admission of testimony as to what the testator said to the draftsman or to others as to his intent. Nevertheless, evidence of the facts surrounding preparation and execution of the will should always be relevant in determining what the words of the will meant to the testator.

After-Acquired Property

U.P.C. § 2-604

Ark. § 60-409

Basically the above provisions are the same. The only difference is that under the U.P.C. general section a contrary intent may be "indicated by the will" whereas under the Arkansas statute it is necessary that the contrary intention "manifestly appears" in the will. The difference is one of nuance which most courts would ignore. Although the Arkansas statute does not contain the more general presumption that the will passes all of testator's property which he owns at death, modern courts use that presumption without statutory base.

At early common law a devise of real property could not operate to pass after-acquired realty. Such a view of the devise has long been obsolete. Arkansas so held even before the above statute was adopted in 1949.¹⁶⁵

Requirement of Survival

U.P.C. § 2-601

165. *Patty v. Goolsby*, 51 Ark. 61, 9 S.W. 846 (1888).

[No comparable Arkansas Statute.]

At common law a devisee had to survive the testator in order to take, and this is the present Arkansas rule. However, unless the terms of the will express a requirement that the devisee survive for a stated time, such as ninety days after the testator's death, or until a stated event such as distribution of the estate, it is sufficient that the devisee survive for only a second. The dilemma of resolving succession when the sequence of deaths cannot be determined by available evidence (sometimes referred to as "simultaneous death") is met by the Uniform Simultaneous Death Act, in force in Arkansas.¹⁶⁶

The U.P.C. provision goes beyond the common law rule and requires that a devisee must survive the testator by 120 hours (roughly five days). It parallels a comparable requirement in the intestate succession part of the Code that a person survive a decedent by 120 hours in order to take as an heir. The purpose of the U.P.C. provision is to deal with rapid sequence of deaths, usually arising from a common accident, which may result in double administration of the same property and perhaps in devolution of ownership to persons unintended by the testator. Of course, like all the construction rules to be discussed, the careful draftsman anticipates the problem and can by testamentary provision provide a better answer to the individual client's needs and wishes. To illustrate the operation of the section, assume testator has a simple will devising his estate to his wife outright. They have been married 10 years but have no children. They are involved in an auto accident, and both fatally injured. The wife survives her husband by two days. Under present Arkansas law she would inherit the entire estate, which on her death would pass to her relatives. There would be an administration of her husband's estate, and then the same property would be administered again in the wife's estate with double probate expense. Under the U.P.C. section the devise to the wife would lapse and pass to the testator's relatives as though she had predeceased him.

Note that the U.P.C. provision does not operate if the will contains certain language. In some family situations involving large estates, it may be desirable to have part of the property of one spouse pass to the other spouse in order to qualify for the marital

166. ARK. STAT. ANN. §§ 61-124 to -129 (1971).

deduction¹⁶⁷ even though this results in double probate expense. In such cases it is common to provide in the will:

If my wife, _____, and I die under circumstances such that there is no sufficient evidence that we have died otherwise than simultaneously she shall, for purposes of this Will, be deemed to have survived me.

Such language precludes operation of both the Uniform Simultaneous Death Act and U.P.C. section 2-601, as well as being permissible for tax purposes.¹⁶⁸ A second type of clause in the will which would override the section would be a gift to a devisee "if she survives me, but if she fails to survive me," then to another person.¹⁶⁹ Presumably the testator thought about survival and did not want to require survival for any particular length of time. Finally, for purposes of the marital deduction problem, it is possible to condition the marital gift upon survival for six months after the testator and not lose the deduction;¹⁷⁰ such a requirement obviously overrides section 6-201, but so would a simple condition that the devisee "survive me by one day."

If the U.P.C. is adopted, it is important to retain the Uniform Simultaneous Death Act.¹⁷¹ It covers devolution of title in nontestamentary situations, like joint tenancy and insurance. Even in the testamentary situation, a simple will devising property to someone "if he [she] survives me," which takes the devise out from U.P.C. section 2-601, may present an issue of priority of death and fall within the Uniform Simultaneous Death Act.

Oddly, U.P.C. section 2-601, unlike U.P.C. section 2-104, contains no express provision for the rare case where it is known that the devisee survived the testator, but the precise length of time of survival cannot be determined. Arizona added wording to cover that situation.¹⁷²

Lapse

U.P.C. § 2-605
Ark. § 60-410 (C)

167. I.R.C. § 2056.

168. Treas. Reg. § 20-2056(e)-2(e).

169. Estate of Kerlee, 98 Idaho 5, 557 P.2d 599 (1976).

170. Treas. Reg. § 20.2056(b)-3. The deduction is of course lost if the spouse fails to survive for the required period.

171. ARK. STAT. ANN. §§ 61-124 to -130 (1971).

172. ARIZ. REV. STAT. ANN. § 14-2601(B) (1975).

At common law if a devisee died after execution of the will but before the testator, the gift was said to "lapse"; if the devisee was dead when the will was executed, the gift was "void." Many testators when preparing a will think in short range terms: "If I die tomorrow, whom do I want to take my property?" The possibility of the devisee dying before the testator *ought* to be considered and an alternative or substitute gift made. The above statutes take care of the ordinary cases where the possibility is overlooked.

Note the basic difference. The Arkansas statute is limited to gifts to a child or grandchild of the testator, whereas the U.P.C. section is broader and would include a devise to a brother or sister, or a first cousin (or any other person in the category who could be an heir in intestacy). Some statutes are even broader, encompassing devises to friends.

Both statutes expressly apply to class gifts (such as devise of property to "my children"), thereby eliminating an otherwise troublesome problem of statutory interpretation.¹⁷³ Beyond that, however, the U.P.C. section is more artfully drafted. It expressly covers the "void gift" (where the devisee is dead when the will is executed) which is technically not a lapse,¹⁷⁴ and it does so even in the case of a class gift. It also spells out the method by which issue of the devisee take, as for example where there is a gift to a named son who predeceases testator. Assume the son left a daughter who survived testator and two children of a second daughter who died before the testator, those children also surviving testator. Under the U.P.C. the devise would go half to the surviving daughter and one-quarter to each of the children of the deceased daughter. The Arkansas courts might reach the same result on the wording "as if such devisee had survived the testator and died intestate," but an argument can be made that it would go to the daughter who survived.¹⁷⁵

The Arkansas statute applies "[u]nless a contrary intent is indicated by the will." The same rule prevails under the U.P.C. Although there is no express provision in U.P.C. section 2-605 to that effect the general provision in U.P.C. section 2-603 is applicable and is the same as the Arkansas wording. Note that a simple addition of the words "if surviving" in the devise results in lapse

173. L. SIMES, *FUTURE INTERESTS* § 104 (2d ed. 1966).

174. ATKINSON, *supra* note 29, § 140.

175. *Scholem v. Long*, 246 Ark. 786, 439 S.W.2d 929 (1969).

even though there is no alternative disposition.

Failure of Testamentary Provision

U.P.C. § 2-606

Ark. § 60-410 (a), (b)

The Arkansas and U.P.C. statutes are the same. The present Arkansas statute was adopted in 1979 and copied from the U.P.C. The prior statute did not deal with the case where the residue was devised to more than one person and one of the residuary devisees predeceased or his share failed for some other reason. In *Eckhart Heirs v. Harlow*,¹⁷⁶ a 1972 case, it was held that the residuary share passed intestate. The above statutes reach the opposite result, passing the share to the remaining residuary devisee or devisees. Note that the antilapse statute might save the share for the issue of the deceased residuary devisee under both statutes.

Ademption by Extinction

U.P.C. § 2-608

Ark. §§ 60-412, 60-414

The above statutes deal with changes in specifically devised property after the will is executed and before the testator dies. Suppose testator has specifically devised to her daughter described real property in Pulaski County. Subsequently, the testator may enter into a contract to sell the property, the property may be condemned, or the buildings on the property may be destroyed by fire. At common law the property, or part of it, is no longer in the estate and hence the gift has been "adeemed" or extinguished.¹⁷⁷ The U.P.C. attempts to ameliorate this result in certain cases. Suppose the purchaser still owes money on the contract at the time the testator dies; can the devisee claim the balance in place of the real property devised to her? If the condemnation award is unpaid, should that go to the specific devisee of the land or fall into the residue? If the insurer of a fire policy on the building pays the amount of the loss to the executor, should the proceeds go to the devisee or into the residue? Under the U.P.C. the specific devisee would win the above cases. To this extent there is nonademption. Note, however, that the U.P.C. would not help the specific devisee

176. 251 Ark. 1018, 476 S.W.2d 244 (1972).

177. ATKINSON, *supra* note 29, § 134; 6 PAGE, *supra* note 138, §§ 54.1 to -37.

if the purchaser (or condemnor or insurer) had made payment to the testator during the testator's lifetime, even though the testator believes the money will go to the devisee of the land and tells the devisee of that intent.

Subsection (b) of the U.P.C. section 2-608 corresponds to present Arkansas section 60-414. Both cover sale by a guardian of property (called a "conservator" under the U.P.C.), but the U.P.C. provision is broader: it covers the problems of condemnation awards and insurance proceeds during guardianship. It also deals more carefully with the case where the testator has recovered testamentary capacity at the time of his death.

The only other Arkansas statute bearing on ademption is section 60-412. Its wording is puzzling, but it can be interpreted to give the specific devisee the right to any unpaid part of the purchase price. Since any right to specific performance is normally conditioned on payment of consideration, and the statutory language provides that the sale does not "revoke the previous devise" (terminology used by some courts instead of "ademption"), presumably the purchaser must pay the balance on the contract to the specific devisee and not to the personal representative under the will. If the purchaser elects to sue for damages if the devisee refuses to perform, the devisee ends up with the specifically devised property as well as liability for any damages.

However, the Arkansas statute falls short in other situations, as where the property has been condemned rather than sold or where there is a casualty loss to the property. Both of those cry out for statutory relief. Like sale by a guardian, these are situations where the testator has done nothing to show his intent to change the property.

It can, of course, be argued that the U.P.C. falls short of preventing ademption in all cases, but it is a substantial improvement over the present Arkansas statute. The U.P.C. also has a special section on corporate and other securities which is in part a nonademption statute.

Changes in Corporate Securities Specifically Devised

U.P.C. § 2-607

[No corresponding Arkansas statute.]

A specific devise of corporate securities may give rise to a variety of problems in the modern business world where nothing is

static. Assume a specific devise of common stock in a named corporation; after the execution of the will and prior to testator's death, the corporation may declare a stock dividend, may split the shares, may issue stock options to the testator, may undergo a merger or consolidation with another corporation, may be reorganized, or may be subject to a government divestiture suit resulting in distribution of holdings in another corporation. At testator's death he may hold none of the originally devised shares but shares of another entity; or he may hold the original shares plus other shares in the same or another corporation. What passes under the original devise? These problems have been litigated with widely varying results in the absence of statute, always at considerable expense to the estate if the beneficiaries cannot agree. When there is no local statute or case precedent, the personal representative is faced with what may well be a difficult task in distributing the shares. Some of the problems (stock splits and stock dividends) are traditionally treated under the heading "accessions," others (the change from shares of one corporation into shares of another) as "ademption by extinction."

The U.P.C. provides a definite set of rules, applicable only if the testator has not indicated a different rule by the terms of his will. Of course, some careful draftsmen anticipate the problem of corporate change and employ standard clauses,¹⁷⁸ generally similar to the U.P.C. rules.

Note that U.P.C. section 2-607(b) excludes other distributions prior to death. Thus cash dividends paid to the testator, even though kept in a special account, would not pass to the specific devisee but would be part of the residue. The same rule would govern additional shares purchased by the testator by exercising a purchase option. Because title passes at death under the U.P.C. section 3-101, distributions *after* death belong to the specific devisee. The same rule prevails now under Arkansas section 58-608, the Uniform Principal and Income Act, which would be retained if the U.P.C. were adopted. What of cash dividends received after testator's death, but declared before his death to stockholders of record as of a date prior to death? These should be treated as distributions "prior to death." (See the Official Comment to U.P.C. section 2-607). The crucial factor is the date fixed for determination of record stockholders to whom payment is to be paid or, if no such

178. See, e.g., PRACTICING LAW INSTITUTE, PRACTICAL WILL DRAFTING 28 (2d ed. 1975).

date is fixed, the date of declaration.¹⁷⁹

The U.P.C. section is not an answer to all possible problems, and courts should feel free to use basic common law concepts to resolve unusual fact situations not literally within the statutory wording. Thus courts have held there is no ademption where there is a change in form but not substance.¹⁸⁰ In one Arkansas case the testator executed a will devising "all my stock and interest" in a closely held corporation to his son and grandson; later the corporation was dissolved, but the business was carried on by the testator. The court properly ordered distribution of the business assets to the specific devisees in place of the stock.¹⁸¹ Adoption of the U.P.C. should not change this rule. There have been similar situations where a specific devise of a partnership interest was not adeemed where the partnership was incorporated after the execution of the will and the probate court ruled that the devise should be construed to include the corporate stock. This, or a reverse case where the corporation is later changed to a partnership, would not be within the literal wording of U.P.C. section 2-607, but an analogous rule should govern.

Ademption by Satisfaction

U.P.C. § 2-612

[No corresponding Arkansas statute.]

Lifetime transfers of property (usually money) to a family member may be intended as a gift, a loan to be repaid, or as an advance on the family member's share in the transferor's estate. If the transfer is intended as an advance and the transferor has no will, the transfer is treated as an "advancement"; but if the transferor has a will devising property to the donee, the appropriate legal label is "ademption by satisfaction."¹⁸² The scope of the doctrine at common law was originally narrow.¹⁸³

The U.P.C. section, like the parallel section on advancement in the intestate estate, is based on the premise that in modern

179. ARK. STAT. ANN. § 58-604(e) (1971).

180. ATKINSON, *supra* note 29, § 134; 6 PAGE, *supra* note 138, § 54.11.

181. Mitchell v. Mitchell, 208 Ark. 478, 187 S.W.2d 163 (1945).

182. In Blanks v. Clark, 68 Ark. 98, 56 S.W. 1063 (1900), the Arkansas Supreme Court refers to the doctrine of "advancement" in dealing with an allegation that a specific devise had been offset by lifetime transfers of money. The issue is one of satisfaction. The court reached the correct result.

183. ATKINSON, *supra* note 29, § 133; 6 PAGE, *supra* note 138, §§ 54.21-.37.

times gifts during the donor's lifetime are not intended to affect the donee's share in the donor's estate, whether testate or intestate; and if they are so intended, the proof should be in writing.¹⁸⁴ Ideally the donor should revise his will or revoke or reduce the original devise by codicil. However, the U.P.C. permits the testator to provide for deduction of the gift by a "contemporaneous writing." The U.P.C. does not impose any formalities on that writing: it may be a letter of transmittal or a record kept in the testator's book of accounts. Alternatively, the donee may at any time acknowledge in writing that the gift was in place of or to reduce the devise; the acknowledgment can be after the testator's death. One purpose of the requirement is to reduce litigation in family situations where some relatives have been given more than others during the donor's lifetime.

Arkansas presently has no applicable statute and no controlling case law.

Exoneration

U.P.C. § 2-609

Ark. §§ 62-2908; 60-413

When a testator devises specific property, is the devisee entitled to the property free of any liens or encumbrances on it at the time of his death; or does he take the property subject to the lien? The will may resolve the problem by specific language: "I devise my residence to my wife and direct my executor to pay off any mortgage, lien or other encumbrance thereon at the time of my death out of the residue of my estate" (exoneration) or "I devise my farm to my son, subject to all liens, encumbrances and other charges thereon" (nonexoneration). If the will contains no indication of testator's intent, which rule should govern the personal representative? In the absence of statute most courts apply exoneration of a specific devise of realty and some reach the same result for a specific bequest of personalty.¹⁸⁵

At present Arkansas follows the common law rule of exoneration. The specific devisee can force the personal representative to pay off any "secured debt" out of general assets of the estate (the "residue"). The Committee Comment to section 62-2908 expresses the Committee's opinion that this is "more likely" to accord with

184. See Official Comment to U.P.C. § 2-612.

185. ATKINSON, *supra* note 29, § 137; 6 PAGE, *supra* note 138, § 51.25.

the testator's intention. Significantly, the Arkansas section applies in intestate situations to exonerate the homestead passing to the widow, and thus serves an important policy function of providing for the widow. The latter problem cannot occur under the U.P.C. intestate succession pattern which assures the surviving spouse of all or a major share of the estate. Under the Arkansas statute it is hard to determine when a testator has "provided otherwise" by his will. If the specific devise is of "all of my right, title and interest in the following real property," has he indicated an intent to devise only his equity subject to outstanding mortgages?

The U.P.C. is based on the opposite premise that the testator who specifically devises property thinks of that property in terms of his "equity," *i.e.*, subject to any mortgage or other security interest. Therefore, the devisee takes subject to the mortgage. The testator can of course provide otherwise, but a general directive to pay debts (standard in many wills) is not enough to force exoneration. If the mortgage holder files a claim and is paid out of general assets, the personal representative must then collect from the specific devisee.

Neither the Arkansas statute nor the U.P.C. attempts to distinguish according to the time and purpose of the mortgage. Consider the following situations:

- (1) Testator specifically devises real property, which is subject to a purchase money mortgage when he executes the will.
- (2) Testator owns real property free of mortgage when he executes his will specifically devising the property. Later he mortgages the property in order to construct improvements on it.
- (3) Same, except that testator mortgages the property in order to acquire other property which at his death is part of the residue.

In view of the standard modern practice of mortgage-holders not to file a claim in probate but to rely on security, and of sale "subject to mortgage," most people think of their interest in property rather than of the land itself as the subject of the specific devise. Hence in the first two cases nonexoneration seems to accord with intent and fairness. In the third situation exoneration seems more likely to be what the testator intended and results in a fair distribution to both the specific devisee and the residuary devisee.

The nonexoneration rule of the U.P.C. is an easier rule to administer simply because the creditor on long-term obligations like mortgages usually relies on his security rather than the personal

obligation of the decedent.

Abatement

U.P.C. § 3-902

Ark. § 62-2903

The above sections provide for the burden of payment of claims against the probate estate. The Arkansas section also provides for the burden of family allowances, the shares of pretermitted heirs, and the elective share of the surviving spouse.¹⁸⁶ Both sections are copied from section 184 of the Model Probate Code, as is most of the Arkansas Committee Comment and the U.P.C. Official Comment. U.P.C. sections 2-301 and 2-302, dealing with the pretermitted spouse and children, expressly provide for abatement according to section 3-902. However, section 2-207 provides a different method in satisfying the elective share, namely equitable apportionment. Allowances and exempt property under the U.P.C. are governed by their own special rules, sections 2-401 through 2-404, which generally follow the same abatement order as that provided in U.P.C. section 3-902, but if necessary these items take preference over all devises as well as over unsecured claims.

Specifically devised property is used last to pay claims. As between the residuary devisee and the general devisees, the burden falls first on the residue. A demonstrative devise (such as "\$10,000 to be paid out of my savings account in X Bank") is treated as a specific devise to the extent that there is a balance in the savings account at the testator's death; otherwise it is a general devise. Under both the U.P.C. and the Arkansas statutes the old English preference for realty over personalty no longer prevails.

Subsections (b) in both the U.P.C. and the Arkansas statute are almost identical. Here lies the potential flexibility to counteract the mathematical approach in subsection (a). Abatement is necessary in estates where assets either have declined in value or have been used up after the execution of the will, or the claims against the estate are beyond the testator's expectations when the will was prepared (for instance, expenses of last illness may be astronomical in some cases). In one sense the testator did not foresee the development which leaves his estate inadequate to pay claims and still satisfy the provisions of his will. The Committee Com-

186. For the common law rules, see ATKINSON, *supra* note 29, § 136; 6 PAGE, *supra* note 138, Ch. 53.

ment to the Arkansas statute and the Official Comment to the U.P.C. section both refer to preferring a general legacy to a wife or child over other general legacies. The statutory language seems broad enough to authorize preference of a general devise over a specific devise, or even a residuary devise over others. Of all construction problems, this one calls for more creative thought in preserving the testamentary scheme. Note that the reference to "implied" purpose of a devise should allow the court to explore all the facts and circumstances surrounding the execution of the will. Both Comments refer to the "probable" purpose, which comes closer to an accurate description of what the court should try to determine.

Related to abatement is the problem of determining the burden of death taxes. U.P.C. section 3-916 incorporates the Uniform Estate Tax Apportionment Act, originally promulgated in 1958 and revised in 1964. Arkansas, however, has a very simple statute providing for equitable apportionment.¹⁸⁷ The difference between the two sections is beyond the scope of this article. However, it might be noted that under the Arkansas statute, unless the will provides otherwise, charitable devisees must bear a portion of the total estate tax burden even though the charitable devise itself is deductible from the gross taxable estate,¹⁸⁸ such an unfortunate result would not be reached under the Uniform Estate Tax Apportionment Act.

Intent to Exercise a Power of Appointment

U.P.C. § 2-610

[No comparable Arkansas statute.]

The increasing use of marital deduction trusts and family trusts creating general and special testamentary powers of appointment respectively means that more testators will have a power to appoint by will. If the donee of the power consults a skilled lawyer to prepare his or her will, the resulting document should leave no question as to whether the donee-testator intended to exercise the power; the will should specifically refer to the power and expressly state that the testator intends to exercise (or not to exercise) the

187. ARK. STAT. ANN. § 63-150 (1971).

188. *Commercial Nat'l Bank v. Arkansas Children's Hosp.*, 256 Ark. 1028, 511 S.W.2d 640 (1974). The result is that the charitable deduction itself is reduced by the amount of the tax burden falling on the charitable bequest. I.R.C. § 2055(c).

power. Unfortunately not all testators seek or receive competent legal advice. In some cases the will may be prepared and executed before the power is even created. The result may be an expensive lawsuit to determine whether the testator intended to exercise the power.¹⁸⁹ This is particularly true where the power is general. Courts have disagreed over whether a testator whose will purports to devise "all my property at the time of my death" or "all the rest, residue and remainder of my property of any kind" intended thereby to include property subject to the general power.¹⁹⁰ On the one hand, a power of appointment is not itself "property"; on the other hand, a lay person is not likely to be aware of such a legalistic distinction and may refer to a trust from which he or she receives all the income and which in lay terms can be disposed of by his or her will as "my property." The need for a statute to resolve this problem is widely recognized.¹⁹¹

U.P.C. section 2-610, as finally promulgated, differs from the original draft in wording, although not so much in substance. The Official Comment accompanying the section was designed to go with the earlier drafts and unfortunately was not revised. However, the Comment is still helpful. The section is based on the premise that the donor of a general power (particularly in marital deduction trusts, which is the only place where such powers should be used) prefers to have the property pass in default unless the donee really intends to exercise the power. Normally, a general disposition of all the testator's property or a general residuary clause would not be enough. Suppose, however, the testator executes a will which expressly makes general devises exceeding individually owned property and which therefore would be meaningless without including the property subject to the general power of appointment. Read in light of all the circumstances, the will indicates an intent to include the appointive property and should satisfy the last clause of U.P.C. section 2-610.

Suppose the donee's will recites: "It is my intent to exercise any power of appointment I may have at the time of my death." Clearly this wording ought to exercise the power, unless the instru-

189. Undoubtedly the most litigated issue relating to powers of appointment is that of intent of the donee to exercise the power.

190. L. SIMES, *FUTURE INTERESTS* §§ 67, 68 (1966).

191. A recent article by Professor Susan French is highly recommended: *Exercise of Powers of Appointment: Should Intent to Exercise Be Inferred From a General Disposition of Property?* 1979 DUKE L.J. 747. The article contains a critique of U.P.C. § 2-610.

ment creating the power itself requires a reference to the specific power (a rather common provision in marital deduction trusts). But if the creating instrument does not require such a reference, does the statute do so by the words: "unless specific reference is made to the power"? Although the inclusion of the quoted words is puzzling, the answer should be negative. First, this is an express recital of intent to exercise any (and hence all) general powers by the will and would be given effect under U.P.C. section 2-603. Second, the statutory words are qualified by the alternative "or there is some other indication of intention to include the property subject to the power."

Modern courts have struggled to give effect to the donee's intent where it can be found. U.P.C. section 2-610 was not intended to hamper that search, but rather to repudiate the minority rule that a general residuary clause exercises a general power without any other evidence of such intent. Suppose that the creating instrument contains a clause like the following: "Upon the death of my said wife, the assets then held in the trust, or any part thereof, including accrued and undistributed income, shall be distributed to her appointee or appointees, including her estate, in trust, or otherwise, as she shall appoint in her will specifically referring to this power," and that the donee's will reads: "I give all the residue of my property, including any over which I may have any power of appointment to [a named devisee]." The issue in such a case is whether the donee has met the condition imposed by the donor; U.P.C. section 2-610 is not applicable in determining that issue. The answer ought to be that the general wording of the residuary clause does not satisfy the condition.¹⁹²

CONCLUSION

Lawyers are properly reluctant to support a change in any law unless convinced that the new law will be an improvement. The purpose of this article has been to provide a detailed comparison of Article II of the U.P.C. with existing Arkansas law. The central thesis, supported by that comparison, is that the U.P.C. will substantially improve Arkansas substantive law of intestate succes-

192. Compare *In re Estate of Smith*, 585 P.2d 319, 41 Colo. App. 366 (1978) and *Holzbach v. United Va. Bank*, 216 Va. 482, 219 S.E.2d 868 (1975) with *First Union Nat'l Bank v. Moss*, 32 N.C. App. 499, 233 S.E.2d 88 (1977) and *Will of Berard*, 89 Misc. 2d 838, 393 N.Y.S.2d 149 (Surr. Ct. 1977).

sion, family protection, wills and will construction.

Some members of the Bar may oppose any change because it makes their present knowledge obsolete and requires reeducation. But law exists for the benefit of the public, not for the judges nor for the legal profession who administer the law. The greater simplicity of the U.P.C. and the clarity of its drafting will in the long run benefit the profession. Experience in states which have adopted the U.P.C. is that many lawyers who initially oppose the U.P.C. become supporters after they become familiar with the new provisions.

The procedural parts of the U.P.C., contained in Article III, are in a sense more important for the administration of decedents' estates. The authors support adoption of the entire U.P.C. Nevertheless, the substantive portions can stand alone, with selected definitions from U.P.C. section 1-201, if it appears desirable for Arkansas to consider adoption of the U.P.C. over several legislative sessions.