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A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code

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A COMPARISON OF ARKANSAS'S CURRENT LAW
 CONCERNING SUCCESSION, WILLS, AND OTHER
 DONATIVE TRANSFERS WITH ARTICLE II OF THE 1990
 UNIFORM PROBATE CODE

*Lawrence H. Averill, Jr.**
*Hon. Ellen B. Brantley***

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I. GENERAL INTRODUCTION

A. Scope, Purpose, and Statement of the Problem

This article compares Article II of the 1990 Uniform Probate Code,¹ as embodied in House Bill 1020 and Senate Bill 598,² with

1. UNIFORM PROBATE CODE, OFFICIAL 1993 TEXT WITH COMMENTS (11th ed. 1994).

2. Except as noted, all references are to the version of the Uniform Probate Code introduced in the 1995 Arkansas State Legislative Session as H.B. 1020. As originally introduced into the 1995 Arkansas Legislative Session, H.B. 1020 and S.B. 598 were substantially a copy of the 1990 Uniform Probate Code (U.P.C.). For convenience all references to this bill will be to the U.P.C. and the last four numbers of the section, *i.e.*, U.P.C. § 0-000 (1990) (amended 1993). Conversion to H.B. 1020 is made merely by adding the prefix "28-" to the reference.

existing Arkansas law.³ Although Article II did not pass both houses, it is expected that it will be studied by bar committees for introduction into the 1997 legislature. 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.⁴

Article II contains twenty-three percent of the sections in the Code which makes it the second largest article. It includes the substantive core of what is referred to as the law of wills, intestate succession, and donative transfers. In addition to provisions dealing with how to execute a will and distribution under intestacy, it also includes provisions concerning the surviving spouse's elective share, family protections, rules of construction for wills and other donative instruments, disclaimers, the safekeeping of wills, the Rule Against Perpetuities, and other related matters.⁵ This coverage constitutes a significant portion of the law of gratuitous wealth transfer.⁶

The general public's perception of the word "probate"⁷ is that it refers to a system reeking with unnecessary costs and delays. The resultant cry has been "avoid probate."⁸ Several successful commercial enterprises have been launched from this conceptual pad

3. All references are to the latest version of the section as printed in ARKANSAS CODE OF 1987 ANNOTATED and its supplements. For convenience, the format will merely refer to the numbers of the section, *i.e.*, ARK. CODE ANN. § 00-00-000 (Michie 1987).

4. In 1980, a similar article was published comparing the original version of Article II of the Code with Arkansas law. Ellen B. Brantley & Richard W. Effland, *Inheritance, the Share of the Surviving Spouse, and Wills: Arkansas Law and the Uniform Probate Code Compared*, 3 U. ARK. LITTLE ROCK L.J. 361 (1980). Since that time, the Code has gone through a major revision of Article II and H.B. 1020 incorporates these changes. Although Arkansas law has changed to a small degree, it remains very much the same.

5. U.P.C., art. II, prefatory note at 41 (1990). Substantial portions of this article discussing the analysis of Article II of the Code appear in the author's text on the entire Uniform Probate Code, LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL (3d ed. 1993).

6. The Code and H.B. 1020 cover many other areas as well, *e.g.*, the administration of decedents' estates, guardianship, survivorship accounts. It is beyond the scope of this article to deal with those matters. For a comprehensive review of the entire Code, see AVERILL, *supra* note 5.

7. Technically, "probate" refers to the process of proving and deciding the validity of a will before a court having competent jurisdiction; more generally, it refers to all matters appropriately before the probate courts. BLACK'S LAW DICTIONARY 1202 (6th ed. 1991).

8. Professor Langbein contends that this is what is happening. See John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1136 (1984).

and they accuse the legal profession of perpetrating and perpetuating this undesirable situation.⁹

The source of much of the present dissatisfaction is in the laws themselves. First, there is insufficient uniformity between the laws of the fifty states. This fact may cause not only unjust results but also an inherent confusion and distrust among a very mobile lay populace. Second, some of the relevant laws in this area in many states are not contemporary; consequently, they do not take into account the material changes that have occurred in our society. Not only have we changed from a primarily rural to a primarily urban society, but also from one with a primary emphasis directed to ownership of real estate to one directed toward ownership of personal property and other contractual relationships. Furthermore, our society continues to progress from one educationally and sociologically provincial to one nationally and even internationally cognizant. The continued increase in the number of persons who have had multiple marriages and who have had children with more than a single spouse creates a social phenomenon that current succession law does not adequately address.¹⁰ Many of the present laws on these matters, therefore, do not adequately deal with the primary problems posed by the average person in the succession of wealth at death or in the management of that person's property during disability.

B. A Short History of the Uniform Probate Code¹¹

In 1940, Professor Thomas E. Atkinson suggested to the American Bar Association Section of Real Property, Probate and Trust Law (hereinafter referred to as the Probate Section) that this organization

9. *E.g.*, M. BLOOM, *THE TROUBLE WITH LAWYERS*, ch. 11, pp. 233-63 (1968) (Chapter 11 is entitled "Our Unknown Heirs" and is concerned with attorney fees); NORMAN F. DACEY, *HOW TO AVOID PROBATE* (5th ed. 1993). The Dacey book is still in print and claims it has sold over 1.5 million copies. Probate avoidance books are still popular. *See, e.g.*, ROBERT A. ESPERTI & RENNO L. PETERSON, *LOVING TRUST* (1991); HENRY W. ABTS, *THE LIVING TRUST* (1989); LOUIS AUSTIN, *THE LIVING TRUST ALTERNATIVE* (1988).

10. This trend is one of the themes set out as a principal reason for the substantial alteration to Article II. U.P.C., art. II, prefatory note at 40 (1990) (amended 1993).

11. Substantial portions of the following history appear in three of the author's previous publications. *See* AVERILL, *supra* note 5; Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891-926 (1992); Lawrence H. Averill, Jr., *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code (part 1)*, 7 LAND & WATER L. REV. 169 (1972).

prepare a Model Probate Code.¹² This idea resulted in the publication of a Model Probate Code and accompanying studies in 1946.¹³ Although the Model Probate Code had a direct influence and effect on revisions in several states, it had neither the comprehensiveness nor the impetus to influence a majority of states to adopt it.

In 1963, the Probate Section and the National Conference accepted a suggestion made by J. Pennington Straus of the Philadelphia Bar to revise and consolidate the Model Probate Code and other related and relevant uniform laws into a uniform probate law. In response, each organization formed a separate committee and Professor William F. Fratcher of the University of Missouri School of Law was appointed Research Director to conduct preliminary studies during 1963-64. Thereafter, a Reporting Staff was recruited to draft the Uniform Probate Code under the supervision of the two committees. Professor Richard V. Wellman, then of the University of Michigan and now of the University of Georgia, became the Reporting Staff's Chief Reporter.

After six drafts and six years of extensive research, consultation, and discussion, an official text was approved in August 1969, by the National Conference and by the House of Delegates of the American Bar Association. Although inspired and initiated as a project to redraft and update the Model Probate Code, the eventual finished product turned out to be much more. It not only was more comprehensive in coverage but also exhibited greater innovation and imagination. In addition, many of its basic philosophies were different. Consequently, the Code offered a more viable package for influencing and affecting modern probate legislation.¹⁴

In March of 1971, Idaho became the first state to adopt the Code substantially in whole.¹⁵ Since that time, more than thirty percent of the fifty states have enacted laws which substantially conform to the Code or parts of it.¹⁶

12. Thomas E. Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUR. SOC'Y 183, 189 (1940). See also, Thomas E. Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 J. AM. JUR. SOC'Y 137 (1939).

13. LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW—INCLUDING A MODEL PROBATE CODE* (1946).

14. Naturally, through the last twenty years the Code has been the subject of a great deal of legal commentary. One of the most important publications was the *UNIFORM PROBATE CODE PRACTICE MANUAL* published by the Association of Continuing Legal Education Administrators in 1972 and edited by Professor Robert R. Wright. ACLEA, *UNIFORM PROBATE CODE PRACTICE MANUAL* (1972). It contained a series of articles by recognized authorities on all parts of the Code. It has never been kept up-to-date.

15. IDAHO CODE §§ 15-1-101 to -401 (1972) (effective July 1, 1972).

16. See U.P.C., 8 U.L.A. 1-4 (Supp. 1995).

C. Uniform Probate Code Maintenance Efforts

For the purpose of promulgating the Uniform Probate Code, a Joint Editorial Board for the Uniform Probate Code (hereinafter referred to as the Editorial Board) was established in 1970. Its membership now consists of three persons selected by the National Conference, three members chosen by the Probate Section, three members of the American College of Trust and Estate Counsel, two Liaison—Law School Teachers, one Liaison—Probate Judge, the Executive Director, and the Director of Research.¹⁷ The Editorial Board's responsibilities are: (a) to monitor literature dealing with the Code; (b) to watch for problems that develop in the Code itself and that arise in states which have enacted or are considering enacting the Code; (c) to educate the Bar and the public about the Code; and, (d) to reevaluate, alter, and edit the Code's text for the purpose of removing imperfections and improving content, both substantially and editorially.¹⁸

With all of this supervision and support, the Code was frequently updated and improved. During 1975-76, the National Conference and the House of Delegates of the American Bar Association approved significant amendments called the "1975 Technical Amendments" promulgated by the Joint Editorial Board. Many of these amendments included suggestions and improvements made by various bar committees that have studied the Code for enactment in their respective states. Other alterations were made in 1977, 1979, 1982, 1984, 1987, 1988, and 1989.¹⁹ In 1990, the National Conference again approved a revision which substantially altered Article II. The process never stops. In 1993, a significant reorganization of the Code's elective share provisions was approved.

The influence and use of the Code are growing in a variety of ways.²⁰ The laws of nearly all, if not all, states have been affected by the Code. The primary vehicles of influence are as follows: (1) Enactment as a Code in full with some amendments. Fifteen states

17. See U.P.C., at vi-vii (1990).

18. "Joint Editorial Board," 1 U.P.C. NOTES 2 (July 1972). Professor Dick Wellman was named as its first Educational Director. Professor Wellman continued to promote and advocate both the enactment of the Code and its continual improvement. One of the most important developments in the past several years was the recruitment and appointment of Professors John Langbein and Lawrence Waggoner to the Editorial Board and as Director of Research, respectively.

19. See U.P.C., at xi (1990).

20. See Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

fall into this category: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, and Utah.²¹ (2) Piece-meal enactment of segments or sections of the Code for inclusion into another probate code or law. Nearly all the other states have enacted some part or section of the Code. Sections of Article II have been particularly popular. For example, California incorporated many provisions of the Code, in whole or in part, into its recent revision of its probate code. In order to assure proper judicial construction of these Code provisions, the new law requires that any portion of the California code that is derived "in substance" from the Uniform Probate Code must be "construed as to effectuate the general purpose to make uniform the law in those states which enact" provisions of the Uniform Probate Code.²² (3) Referral as a model of modern policy by a court interpreting its own non-Code provision.²³ (4) Referral as secondary or persuasive authority for determining proper rules of construction for the common law.²⁴

Even if comprehensive enactment does not continue, the Code's influence over the law of probate and related matters will continue to increase.

D. A Short History of the Arkansas Probate Code

Arkansas's law of wills, intestate succession, and probate was enacted in more or less its current form in 1949.²⁵ The 1949 Code, which was the product of a committee of the Arkansas Bar Association, did not change the substantive law of wills and intestate succession, but it substantially reformed probate procedure.²⁶

In 1969, again at the urging of a committee of the Arkansas Bar Association, the General Assembly adopted a substantial revision of the probate code.²⁷ This enactment was influenced to some degree

21. U.P.C., 8 U.L.A. 1 (Supp. 1995). For articles comparing the Code to the various state enactments, see Richard V. Wellman & James W. Gordon, *Uniformity in State Inheritance Laws: How U.P.C. Article II Has Fared in Nine Enactments*, 1976 B.Y.U. L. REV. 357; Richard V. Wellman & James W. Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in the First Nine Enactments*, 1975 ARIZ. ST. L.J. 477.

22. CAL. PROB. CODE § 2(b) (West 1991).

23. See, e.g., *First Church of Christ, Scientist v. Watson*, 239 So. 2d 194 (Ala. 1970).

24. See, e.g., *Russell v. Estate of Russell*, 534 P.2d 261 (Kan. 1975); *Estate of Thompson v. Potts*, 423 N.E.2d 90 (Ohio 1981); *Smith v. Smith*, 519 S.W.2d 152 (Tex. Civ. App. 1974).

25. 1949 ARK. ACTS 140.

26. See ACTS OF 1949 GENERAL ASSEMBLY, 3 ARK. L. REV. 351, 375 (1949).

27. 1969 ARK. ACTS 303.

by the Uniform Probate Code in its current form, the Third Working Draft, but the Act did not follow the Code in most respects.²⁸

Since 1969, there have been a number of revisions, but none of a general nature. In 1981, the laws of dower and curtesy were revised in response to a decision of the Arkansas Supreme Court.²⁹ The two estates had differed in some respects before 1981 and the General Assembly modified the law to make curtesy available under the same terms as dower.³⁰ Other revisions were directly from the Uniform Probate Code. For example, Arkansas adopted the provision allowing disposition of tangible personal property by an unwitnessed writing directly from section 2-513 of the original Uniform Probate Code.³¹

II. INTESTATE SUCCESSION

A. General Principles of Intestacy

Studies indicate that a substantial percentage of persons who have accumulated wealth during their lifetime die without creating comprehensive inter vivos arrangements and without making effective testamentary instruments for the disposition of their property.³² When this happens, the decedent's property passes by intestate succession according to a statutory estate plan.³³

A commonly expressed purpose for intestate succession statutes is to distribute a decedent's wealth in a pattern that represents a close approximation of that which an average person would have designed had that person's desires been properly manifested.³⁴

28. Robert R. Wright, *The New Arkansas Inheritance Laws: A Step Into the Present with an Eye to the Future*, 23 ARK. L. REV. 313 (1969).

29. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981) (applying *Orr v. Orr*, 440 U.S. 268 (1979)).

30. 1981 ARK. ACTS 714.

31. ARK. CODE ANN. § 28-25-107(b) (Michie 1987).

32. See Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 336-39. This study, conducted by telephone in a five state area, indicated that the older one is more likely to have a will. Although on average nearly 55% of the respondents did not have a will, the percentage decreased as the age of the respondents increased. Consequently, the percentage of persons who die without a will is probably less than 40%. Even so, this constitutes a large number of persons.

33. THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* § 1, at 4 (2d ed. 1953).

34. U.P.C., art. II, app. A, pt. 1, cmt. at 523. See *King v. Riffée*, 309 S.E.2d 85 (W. Va. 1983). The court states:

Our laws concerning intestate succession are designed to effect the orderly

In addition, the legislature's perspective as to how inheritances should be distributed is significant.³⁵ Obviously, to accomplish this task on a general basis, legislatures have developed objective rather than subjective programs that are necessarily subject to debate. Furthermore, any legislation on this matter naturally reflects the attitudes of the legislature of that moment under its contemporary societal ideals and policies. Attitudes change, of course, as these ideals and policies change.

Intestate inheritance is recognized by all fifty states and territories. The standard intestacy statute specifically apportions the intestate's property among a list of prioritized relatives.³⁶ The surviving spouse, descendants, and parents of the intestate are the standard preferred beneficiaries.³⁷ In varying degrees, other ancestors and collateral relations are also protected after the preferred relations.³⁸ Except for the surviving spouse, inheritance is usually limited to consanguine relations.³⁹ Occasionally, the surviving spouse's consanguine relations may take if the decedent's consanguine relations cannot.⁴⁰

The relational range of consanguinity necessary in order to take in intestacy varies among the states. Most intestacy statutes protect consanguine relations through grandparents and their descendants.⁴¹ Some even make no express relational cutoff point and if the specified relations in the statute cannot take, the intestate's estate passes to the determinable nearest of kin.⁴² All states recognize that the property escheats to the state if no one qualified under the intestacy provisions can take.

In recent times when intestacy statutes have been the subject of legislative reform, several policy disputes have arisen. A policy controversy usually relates to the share that the surviving spouse

distribution of property for decedents who lacked either the foresight or the diligence to make wills. The purpose of these statutes, then, is to provide a distribution of real and personal property that approximates what decedents would have done if they had made a will.

Id. at 87-88.

35. Other purposes include the financial protection and social encouragement of the nuclear family, the efficient transfer of titled property, and the promotion of wealth accumulation. Fellows, *supra* note 32, at 324.

36. Arkansas's statute is a typical example. See ARK. CODE ANN. § 28-9-214 (Michie 1987).

37. *Id.* §§ 28-9-214(1) to -214(3).

38. *Id.* §§ 28-9-214(5) to -214(7).

39. Consanguine relations are those related by blood, as opposed to relations by marriage. BLACK'S LAW DICTIONARY 303 (6th ed. 1991).

40. See ARK. CODE ANN. § 28-9-215 (Michie 1987).

41. For an example see ARK. CODE ANN. § 28-9-214(6) (Michie 1987).

42. For an example see MASS. GEN. LAWS ANN. ch. 190, § 3(6) (West 1981).

takes when there are surviving descendants of the intestate or when there are no surviving descendants but other consanguine relatives of the decedent survive. Many persons have urged that the share of the surviving spouse be enlarged from the share currently provided in many states, including Arkansas.⁴³

B. Share of the Surviving Spouse When the Decedent Is Survived by Children

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.⁴⁴ Dower has been statutorily modified in Arkansas. Where the decedent leaves children, dower in land gives a surviving spouse a life interest in one-third of all real estate the decedent owned during the marriage and one-third in fee simple of all personal property which the decedent owned at death.⁴⁵

The inadequacy of the shares under Arkansas law is manifest not only by comparison with the testamentary schemes adopted by those who make wills, but also by the fact that these are the same shares that a surviving spouse takes if the decedent spouse intends to disinherit the spouse.

Under the Code, the surviving spouse is a primary beneficiary in intestacy.⁴⁶ When children of the decedent survive, the surviving spouse inherits as follows: (1) If the decedent is also survived by children who are all children of the decedent and the spouse, the surviving spouse takes all the intestate estate.⁴⁷ (2) If the decedent is survived by one or more descendants who are also descendants of the surviving spouse and by descendants who are not descendants of the surviving spouse, the surviving spouse takes the first \$150,000 of the net estate plus one-half of anything exceeding that amount remaining in the estate.⁴⁸ (3) If decedent is not survived by one or more descendants who are also descendants of the surviving spouse,

43. Unfortunately, Arkansas's highly complex scheme for calculating the share of the surviving spouse, allots only a small share to the spouse if the children survive. ARK. CODE ANN. § 28-9-214 (Michie 1987).

44. *Id.* § 28-9-214(1).

45. *Id.* §§ 28-11-301, -305 (Michie 1987 & Supp. 1993).

46. U.P.C. § 2-102 (1990) (amended 1993).

47. *Id.* § 2-102(1).

48. *Id.* § 2-102(3).

but is survived by one or more descendants who are not descendants of the surviving spouse, the surviving spouse takes the first \$100,000 of the net estate, plus one-half of anything exceeding that amount in the estate.⁴⁹ (4) Dower is abolished.⁵⁰

The approach to the first situation is derived from several studies that indicate testators usually follow this approach in their wills. The second and third situations address the phenomenon of the growing numbers of multi-relationship children; consequently, the Code reduces the share of a surviving spouse in order to provide for descendants who are not the surviving spouse's descendants. The Code approach gives limited protection in relatively large estates to decedent's descendants of relationships other than the one existing at death. Notwithstanding the reduction, the share of the surviving spouse is substantial. The abolition of dower is appropriate in a modern society that treats spouses as economic and social equals.⁵¹ Dower is an anachronistic concept that has no relevance to the reality of the modern economic world.⁵²

49. *Id.* § 2-102(4).

50. *Id.* § 2-112.

51. Arkansas is one of less than five states that retain dower as a primary measure of a surviving spouses' rights against a decedent's real property. See RESTATEMENT (SECOND) OF PROPERTY § 34.1 n.6 (1992). The Restatement lists five states, Arkansas, District of Columbia, Kentucky, Ohio, and West Virginia. West Virginia recently repealed dower, substituting the Code's augmented estate concept. W. VA. CODE § 43-1-1 (Supp. 1994). See discussion concerning whether dower is needed, *infra* note 52.

52. The debate over whether there is some residual merit in a dower concept reached full discussion in the efforts to change spousal protection methods in West Virginia. Professor Fisher noted that the proponents for dower contend that other spousal protection methods do not fully protect the surviving spouse and that dower has protections that do. He observed:

However, when the Advisory Committee discussed the proposal to abolish dower as a part of the proposed statute, some members of the committee objected. It was not the at-death "benefits" of dower the objectors wished to preserve, but rather the marital leverage it provided. These members of the Advisory Committee were concerned that if dower were abolished it would make it easier for a title holder of real property to sell the property in anticipation of divorce and "hide" the replacement asset from her or his spouse. Since a prudent purchaser would not accept a deed from the title holding spouse without the signature of the non-title holding spouse, inchoate dower "forced" the title holding spouse to obtain the non-title holding spouse's signature to release dower rights. Obviously, acquiring the non-title holding spouse's signature would make that spouse aware of the conveyance.

John W. Fisher, II, *Statutory Reform Revisited: Toward A Comprehensive Understanding Of The New Law Of Intestate Succession And Elective Share*, 96 W. VA. L. REV. 85, 91 (1993). In response, West Virginia, in repealing dower, enacted a substitute provision that was intended to protect the above rights for a surviving

The current Arkansas intestacy provisions fail to accomplish the goal of intestacy law when there is a surviving spouse. 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.

C. When the Decedent Leaves a Surviving Spouse But No Descendants

Under Arkansas's dower provisions, a surviving spouse receives an absolute interest in one-half of real estate, provided it is a new acquisition, and one-half of personalty.⁵³ These proportions are against other heirs; the spouse's share is reduced to one-third as against creditors.⁵⁴ In ancestral real property, the surviving spouse takes a life estate in one-half of the property.⁵⁵ Again, this share is only a one-third life estate *vis á vis* creditors.⁵⁶

spouse. W. VA. CODE § 43-1-2 (Supp. 1994). Despite the obvious title problems this statute creates, it constituted a reasonable legislative compromise: the state obtained a modern spousal protection process and the dower advocates retained the residual protection they desired. This section provides:

§ 43-1-2. Notice of conveyance.

(a) For purposes of this section, "conveyance" means a dispositive act intended to create a property interest in land and includes the creation of a security interest in real estate.

(b) Any married person who conveys an interest in real estate shall notify her or his spouse prior to or within thirty days of the time of the conveyance if the conveyance involves an interest in real estate to which dower would have attached if the conveyance had been made prior to the date of enactment of this statute.

(c) A person making a conveyance described in the previous sections shall have the burden of proof to show compliance with this section. Such burden shall be met either by:

(1) The signature of the spouse of the conveying party on the conveyance instrument; or

(2) Such other forms of competent evidence as are admissible in a court of general jurisdiction in this state under the rules of evidence.

(d) When a married person fails to comply with the notification requirements of this section, then in the event of a subsequent divorce within five years of said conveyance, the value of the real estate conveyed, as determined at the time of the conveyance, shall be deemed a part of the conveyancer's marital property for purposes of determining equitable distribution or awards of support, notwithstanding that any consideration for said interest in the real estate may already be included in the marital property.

(e) Nothing in this section shall be construed to create a lien or claim against the interest in real estate conveyed in violations of this provision.

W. VA. CODE § 43-1-2 (Supp. 1994)

53. ARK. CODE ANN. § 28-11-307 (Michie 1987).

54. *Id.*

55. *Id.* § 28-11-307(b).

56. *Id.*

In this situation the surviving spouse is also an heir under the Table of Descent and Distribution and takes a share in addition to dower.⁵⁷ Where the surviving spouse and the decedent have been married for three years or more, the surviving spouse takes the entire estate.⁵⁸

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; or if none survive, to grandparents and aunts and uncles, or their descendants; or if none survive, to great-grandparents and great-aunts and great-uncles, or their descendants.⁵⁹ If none of the above relatives survive, the surviving spouse, although married to the decedent for less than three years, takes the remainder of the estate in preference to escheat.⁶⁰

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.

Under the Code, when there are not surviving descendants, a surviving spouse takes: (1) the first \$200,000 of the net estate plus three-fourths of anything exceeding that amount in the event one or more of decedent's parents survive;⁶¹ (2) all the estate, if the decedent is not survived by parents regardless of whether other blood relations of the decedent survive.⁶²

The large monetary prioritized amount ensures that surviving spouses will take the entire estate in most cases. The surviving spouse should take it all if no descendants or parents survive. This pattern is more in line with what most decedents would want.⁶³ The surviving

56. *Id.*

57. *Id.* §§ 28-9-214(2) to -214(4).

58. *Id.* § 28-9-214(2).

59. *Id.* § 28-9-214(4).

60. *Id.* § 28-9-215(1).

61. U.P.C. § 2-102(2) (1990) (amended 1993).

62. *Id.* § 2-102(1)(i).

63. *See* Fellows, *supra* note 32, at 355-68.

spouse is guaranteed a large inheritance in large estates and all the inheritance in small estates.⁶⁴

D. When the Decedent Leaves Descendants But No Surviving Spouse

Under both Arkansas law⁶⁵ and the Code,⁶⁶ the entire estate passes to the decedent's descendants. This is in line with the law of intestacy in all states.⁶⁷

E. When the Decedent Leaves No Descendants and No Surviving Spouse

Under Arkansas law, the Table of Descent includes the following elaborate list of alternatives:⁶⁸ (1) The entire net estate passes to the decedent's parents equally or if only one survives, to the survivor;⁶⁹ (2) If both parents fail to survive, the estate passes to brothers and sisters of the decedent and their descendants, by representation;⁷⁰ (3) If all the above fail to survive, the entire net estate passes to the decedent's surviving grandparents, uncles and aunts or their descendants, by representation;⁷¹ (4) If all the above fail to survive, the entire net estate passes to great-grandparents and great-aunts and great-uncles or their descendants, by representation. Each member of the class or his or her representative descendant receives an equal share;⁷² (5) If all the above fail to survive, the property passes to the surviving spouse of less than three years;⁷³ (6) 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."⁷⁴ (7) If none of the above survive, the estate escheats to the county in which the decedent resided.⁷⁵

Under the Code, if no spouse or descendants survive, the distribution is made according to specified relationships to the decedent

64. U.P.C. § 2-102 (1990) (amended 1993). The Code approach guarantees the surviving spouse at least the first \$100,000 of any estate. *See id.* § 2-104(4).

65. ARK. CODE ANN. § 28-9-214(1) (Michie 1987).

66. U.P.C. § 2-103(1) (1990) (amended 1993).

67. ATKINSON, *supra* note 33, § 16, at 64.

68. ARK. CODE ANN. § 28-9-214 (Michie 1987).

69. *Id.* § 28-9-214(3).

70. *Id.* § 28-9-214(5).

71. *Id.* § 28-9-214(6).

72. *Id.* § 28-9-214(7).

73. *Id.* § 28-9-215.

74. *Id.* § 28-9-215(2). It is unusual but not unique that relations of a predeceased spouse could take from a decedent's estate, but it is a last resort type provision.

75. *Id.* § 28-9-215(3); *see id.* §§ 2-13-101 to -112.

as follows:⁷⁶ (1) The entire net estate passes to the decedent's parents equally or, if only one survives, to the survivor.⁷⁷ (2) If all parents also fail to survive, the entire net estate passes to their descendants by representation.⁷⁸ (3) If all the above fail to survive, the entire net estate passes to the decedent's grandparents or their descendants by representation.⁷⁹ (4) Grandparental shares are divided into maternal and paternal categories if one or more appropriate persons in both categories survive the decedent.⁸⁰ (5) One-half passes to the maternal grandparents or their descendants by representation and the other one-half passes to the paternal grandparents or their descendants by representation.⁸¹ (6) All surviving grandparents share equally the share passing in the appropriate category.⁸² (7) Any surviving grandparent in either category takes to the exclusion of any surviving descendants of either grandparent in that category.⁸³ (8) If no grandparent survives in one category, the share of that category passes to the descendants of both grandparents in that category.⁸⁴ (9) If no grandparent or descendants of a grandparent survive in one category, the share for that category passes in a similar manner to the grandparents or their descendants by representation in the other category.⁸⁵

Comparison: A 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 Code, 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 Code scheme is 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).

76. U.P.C. § 2-103 (1990) (amended 1993).

77. *Id.* § 2-103(2).

78. *Id.* § 2-103(3).

79. *Id.* § 2-103(4).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

F. Escheat

As indicated above, in Arkansas, if no spouse, great-grandparents, issue of great-grandparents, nor relatives of a predeceased spouse survives the decedent, the property escheats to the county (state).⁸⁶ Under the Code, if there are no spouse and no grandparents or issue of grandparents, the property escheats to the state.⁸⁷

Comparison: Both Arkansas law and the Code 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,"⁸⁸ and the administrative problems that could be caused by division of the estate into small portions. The Code provision, by limiting inheritance to grandparents and their descendants, covers fewer relatives 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 Code provision reflects the intent of the "average" testator. The Code 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.

G. Representation by Descendants — Per Stirpes and Per Capita at Each Generation

The concept of representation permits persons in a more remote degree of kinship to an intestate to take the share of a predeceased ancestor even though relatives of closer degree of kinship to the intestate survive. Unfortunately, understanding the basic concept does not adequately explain what share each relative will take. The most common problem has been the determination of the generation which is to be considered the root generation for purposes of setting the stock shares of the more remote relatives who are able to represent their ancestors. For example, under a common, but not uniform, interpretation of the words "per stirpes," this root generation is the generation closest in degree of relationship to the decedent, even if none of those in the closest degree are able to take. Neither Arkansas nor the Code uses this approach.

86. See ARK. CODE ANN. §§ 28-13-101 to -112 (Michie 1987).

87. U.P.C. § 2-105 (1990) (amended 1993).

88. See David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935).

In Arkansas, the estate is divided into shares at the first level at which a taker survives. The heirs take "per capita" if they are all related to the decedent in the same degree;⁸⁹ if they are related in unequal degrees, while those who are related in the closest degree will take per capita, those in more remote degrees will take "per stirpes."⁹⁰ The rationale for this approach is that it is more likely that the intestate would want to treat relatives of the same degree equally. The underlying policy for this approach is that most decedents, if they thought about it, would desire to divide equally the estate among living relatives of equal degree but to favor a living relative of a closer degree. A limiting feature of this policy is that representation is only employed when the descendants are of unequal degree. Although this method will accomplish equality among equals in many cases, it will not accomplish such equality in all situations.

Under the 1990 Code, the estate is divided, for representation purposes, by a method called "per capita at each generation."⁹¹ Accordingly, the estate is divided into primary shares at the first generation that contains one or more living members.⁹² Representation is recognized for living descendants of this generation plus the number of deceased persons in this generation who themselves have living descendants.⁹³ After the living members are allocated their shares, the remaining unallocated shares are combined and divided among the next generation that contains any living members in the same way, and so on.⁹⁴

The foundation for using the per capita at each generation system derives in part from the result of informal surveys which reflect that when persons are given a clear example and asked how they would want their estate distributed, the method selected overwhelmingly is the per capita at each generation approach.⁹⁵

89. See ARK. CODE ANN. § 28-9-204(1) (Michie 1987).

90. *Id.* §§ 28-9-204(2), -205, -214. Although the statute uses the phrase "per stirpes" to describe its representation technique, it might more properly be called "per capita with per capita representation." AVERILL, *supra* note 5, at 48. This technique was the system originally adopted by the Uniform Commissioners when the Uniform Probate Code was issued in 1969. As indicated below, this technique was dropped in 1990 in favor of a system called "per capita at each generation." See *infra* note 95 and accompanying text.

91. U.P.C. § 2-106 (1990) (amended 1993).

92. *Id.* § 2-106(b).

93. *Id.*

94. *Id.*

95. Raymond H. Young, *Meaning of "Issue" and "Descendants,"* 13 PROB. NOTES 225-27 (1988). A questionnaire was distributed to Fellows of the American College of Probate Counsel. (Now called the American College of Trust and Estate

Generally, a person desires to divide his or her estate equally among living relatives of equal degree but to favor a living relative of a closer degree.⁹⁶ The importance of the matter is relevant only when the descendants are of unequal degree. The notable feature of the per capita at each generation method is that it never allows a person of a more remote degree to inherit more than a person of closer degree.

The following example contrasts an application of the above rules. Presume D had three children, C1, C2, and C3. C1 had three children, GC1, GC2, and GC3; C2 had one child, GC4; and C3 had two children, GC5 and GC6.

If at D's death, C2 and C3 are alive, C1 is deceased, and all grandchildren are alive, both systems will distribute among the descendants in the same manner: the portion that the descendants receive will be divided into three stocks with C2 and C3 each receiving one-third, and the children of C1 represent their ancestor and divide the one-third stock share equally. Accordingly, GC1, GC2, and GC3 will each receive one-third of one-third (one-ninth). None of the grandchildren who are C2's and C3's children will share in the estate because their respective ancestors, C2 and C3, survived and took their own shares.

If at D's death, all of the children (C1, C2, and C3) are dead, both systems will again distribute among the descendants in the same way: the distributable portion will be divided equally to each grandchild. Because all takers are of the same degree of relationship to the decedent, these systems ignore the stocks involved and distribute the estate on a per capita basis.

If at D's death, C3 and all grandchildren survived, but C1 and C2 predeceased D, the two systems will distribute the shares differently. Under the Arkansas system, the distributable portion will be divided into three stock shares. C3 receives a full one-third, and the children of each deceased child (C1 and C2) represent their ancestor and divide their ancestor's one-third stock share. GC1, GC2, and GC3 take one-third of one-third or one-ninth and GC4 takes a full one-third. Under the Code's per capita at each generation method, the distributable portion is also divided into thirds and C3 would receive a full one-third. The remaining two stock shares, however, are

Counsel.) *Id.* at 225. The results were surprising to some; they overwhelmingly preferred the per capita at each generation approach over both per stirpes and per capita with representation. *Id.* Professor Averill has had similar results in many years of polling students in decedents' estate classes.

96. See U.P.C. § 2-106 cmt. (1990) (amended 1993).

combined together and the children of the deceased children, C1 and C2, each share equally in the remaining two-thirds of the estate. In other words, rather than retaining the stock shares and dividing these shares depending on how many children each represented ancestor had, all of the persons in the same generation always receive an equal share. In our example, each grandchild representing an ancestor receives one-fourth of two-thirds (one-sixth). If several of these grandchildren are also unable to take and if they left surviving descendants, the same procedure is followed again by combining all of the shares for the deceased grandchildren into one share and then by dividing it equally among all of the great-grandchildren who represent their ancestors.

III. PROBLEMS OF STATUS

A. Necessity of Status Determination

Every inheritance statute describes its intestate succession beneficiaries in terms of relational classifications such as "parent," "grandparent," "descendant," "heirs," and "surviving spouse."⁹⁷ For distribution calculation purposes, it is necessary to identify the person or persons who qualify as members of these classifications. This determination is a problem of status. Because of the importance of this problem for intestate succession and other related purposes, the codes usually contain several specific provisions concerning the status of persons who fall into such categories as half-blooded relatives, posthumous heirs, adopted persons, persons born out of wedlock, and spouses.

B. Half-Blooded Relatives

Half-blooded relatives are a decedent's collateral relatives who share one common ancestor with the decedent but not both common ancestors. Both Arkansas law and the Code provide similarly for half-blooded relatives.⁹⁸ Descendants of ancestors covered by the intestacy provisions who are half-blooded relatives inherit the same as they would if they were whole-blooded relatives.⁹⁹

C. Afterborn (Posthumous) Persons

Under Arkansas law, descendants of a decedent who were conceived before the decedent's death but born after it, inherit the

97. ARK. CODE ANN. § 28-9-214 (Michie 1987) is typical of these statutes.

98. *Id.* § 28-9-213; U.P.C. § 2-107 (1990) (amended 1993).

99. ARK. CODE ANN. § 28-9-213 (Michie 1987); U.P.C. § 2-107 (1990) (amended 1993).

same as if they had been born during the decedent's lifetime.¹⁰⁰ Only descendant's posthumous heirs are covered.

Under the Code, individuals who were conceived before the decedent's death but born after it, inherit the same as if they had been born during the decedent's lifetime.¹⁰¹ These persons must live 120 hours or more after their birth in order to qualify.¹⁰² The relatives who might be able to fall within this category would be either the decedent's descendants, parents' descendants, or grandparents' descendants.¹⁰³

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 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 surviving spouse 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 Code, the niece and the unborn child would share equally.

There appears to be no reason to exclude such an unborn child. Because 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 Code provision would place Arkansas in line with the majority of American jurisdictions.

D. Adopted Persons

In Arkansas, a final decree of adoption terminates all legal relationships between the adopted child and that child's natural parents "for all purposes including inheritance."¹⁰⁴ This creates a parent-child relationship between the adopted child and the adoptive parents "as if the adopted individual were a legitimate blood descendant of the petitioner [adopting parent], for all purposes including inheritance."¹⁰⁵

100. ARK. CODE ANN. § 28-9-210 (Michie 1987).

101. U.P.C. § 2-108 (1990) (amended 1993).

102. *Id.*

103. As governed by U.P.C. § 2-103 (1990) (amended 1993).

104. ARK. CODE ANN. § 9-9-215(a) (Michie 1993).

105. *Id.* § 9-9-215(a)(2).

The Code is more comprehensive and recognizes that there are two primary types of adoption circumstances, *i.e.*, the "new family adoption," and the "family realignment adoption."¹⁰⁶

(1) New Family Adoption: The "new family adoption" concerns the situation where a natural parent or both natural parents voluntarily put their child up for adoption and an entirely new family, usually a husband and wife, adopt the child.¹⁰⁷ In this situation, the Code severs the relationship of the adopted child from that child's natural parents and grafts a new relationship between the adopted child and the adopting parents for inheritance purposes.¹⁰⁸ Under this analysis, the adopted person inherits by, from, and through that person's adopting parents and vice-versa. However, no by, from, or through inheritance rights continue between the adopted child and the natural parents or vice-versa.¹⁰⁹

(2) Family Realignment Adoption: The "family realignment adoption" concerns the situation where one of the natural parents continues as a normal custodial parent of the child, a new adopting parent or non-natural parent adopts the child, and the other natural parent continues in a noncustodial relationship.¹¹⁰ In this situation, the Code does not automatically sever inheritance possibilities between the child and either of the child's natural parents. The child is permitted to inherit by, from, and through both natural parents and the adopting parent.¹¹¹ The adopting parent inherits by, from, and through the child. The custodial natural parent may inherit by, from, and through the child if that natural parent has openly treated the child as that person's child and has not refused to support the child during the child's years when support is legally mandated.¹¹²

106. U.P.C. § 2-114(b) (1990) (amended 1993).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. The comment to section 2-114 states: "The adopted individual and the adopted individual's descendants continue to have a right of inheritance from and through that noncustodial natural parent, but that noncustodial natural parent and that noncustodial natural parent's family do not have a right to inherit from or through the adopted individual." *Id.* § 2-114 cmt. Perplexingly, section 2-114(c) implies that either natural parent could inherit if he or she "openly treated the child as his [or hers], and has not refused to support the child." Do these statements conflict? From a practical standpoint they probably do not. It is unlikely that the noncustodial natural parent would satisfy this requirement but what if one did? Could that noncustodial natural parent and his or her relatives inherit from the adopted child? For example, consider the natural parent who has three children which he or she supported until death. At death the decedent left a surviving

The primary difference between the adoption provisions in Arkansas and the Code concerns the status of the natural parents when one of the natural parents continues as a normal custodial parent of the child, a new adopting parent or non-natural parent adopts this child, and the other natural parent continues in a noncustodial relationship. Under Arkansas law, the adopted child would not inherit from or through the noncustodial parent, but would inherit under the Code. The Code grants greater inheritance protection to the adopted child. A natural parent of the adopted child can inherit from this child only if the parent openly treated the child as his or her child and willingly supported the child.¹¹³ Considered through the viewpoint of the adopted child, these provisions seem reasonable and preferable.

E. Nonmarital Issue

Under Arkansas law, the nonmarital ("illegitimate") child is able to inherit from and through the child's mother, and may inherit from and through his or her father if there is (1) an adjudication of paternity, (2) a written acknowledgment 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 an attempt to marry 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.¹¹⁴ A 1979 amendment to the statute left intact the earlier provision legitimizing the children of void marriages and children whose parents later marry and who are recognized by the father.¹¹⁵

The Code provides that the marital status of parents, as far as their children are concerned, is irrelevant for inheritance purposes.¹¹⁶ Consequently, within the meaning of the intestacy laws for purposes of determining succession, a nonmarital child inherits by, through, and from natural parents so long as the parent and child relationship can be established. Inheritance from or through the child by a

spouse, two adult children by a previous relationship, and one minor child from the current relationship. The latter's surviving natural parent remarries and the new spouse adopts the minor child but not the adult children. If the adopted parents predecease the adopted child, do the adopted child's non adopted half-blooded siblings have intestacy inheritance rights from the adopted child? Possibly they should and section 2-114(c) may allow them to do so.

113. U.P.C. § 2-114(c) (1990) (amended 1993).

114. ARK. CODE ANN. § 28-9-209 (Michie 1987).

115. 1979 ARK. ACTS 1015, §§ 1-3.

116. U.P.C. § 2-109(2) (1990) (amended 1993).

natural parent or his or her kindred, however, occurs only if that parent openly treated the child as his or her child and did not refuse to support the child while the parent had a legal obligation to provide support.¹¹⁷

The Code eschews the existence of a marriage when a child is born and relates inheritance to maternity and paternity instead. Because it does not define what a parent-child relationship is, other states' laws concerned with parentage must be referred to.¹¹⁸ Some of the Arkansas 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, might be retained unless the Uniform Parentage Act is enacted in Arkansas.¹¹⁹

F. Aliens or Noncitizens

Under both Arkansas law and the Code, persons who are aliens or noncitizens are not disqualified from inheriting or transmitting by inheritance merely because of their alienage.¹²⁰

G. Survivorship

In order to inherit in intestacy, an heir must survive the intestate.¹²¹ The general common law rule holds, however, that survival need not be for any specific length of time: any measurable length of time such as one minute or theoretically one second is sufficient.¹²² When the question of one's survival materially affects the distribution of the intestate's estate, the timing of death becomes an extremely disrupting and litigable issue.¹²³

In Arkansas, disputes over survivorship are determined under the original Uniform Simultaneous Death Act.¹²⁴ Section 1 of this Act provides that in an intestacy situation when "there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had

117. *Id.* § 2-114(c).

118. *Id.* The Code recommends enactment of the Uniform Parentage Act but will function under any set of provisions concerning paternity. For the Arkansas approach, see ARK. CODE ANN. §§ 9-10-101 to -119 (Michie 1993).

119. See ARK. CODE ANN. § 28-9-209(d) (Michie 1987).

120. *Id.* § 28-9-211; U.P.C. § 2-111 (1990) (amended 1993).

121. "Heir" is defined at ARK. CODE ANN. § 28-9-203(b) (Michie 1987) and U.P.C. § 1-201(21).

122. ARK. CODE ANN. § 28-9-203(c) is typical. It provides that an interest in property passes "immediately" upon the death of the intestate.

123. See *infra* note 126 and accompanying text.

124. ARK. CODE ANN. § 28-10-101 (Michie 1987).

survived.”¹²⁵ Unfortunately, this solution is only a partial one. It clearly implies that if there is adequate proof of the actual sequence of death in measurable time, the presumption does not apply and the “surviving” heir, no matter for how short a period of time, will be entitled to inherit that heir’s intestate share from the intestate’s estate. This issue alone has caused litigation over who survived, and unnecessary expense by requiring multiple administrations of the same property.¹²⁶

Under the Code, in order to qualify as an heir, a person must survive the decedent for 120 hours.¹²⁷ Furthermore, the burden of proving the heir’s survivorship for the stated length of time is put on the person who seeks to claim through the heir. Failure of such proof is conclusively presumed to show failure to survive. The only exception to this rule is that the survival time requirement does not apply if the decedent’s property would escheat to the state because of a death of the only heir or heirs during this time period.¹²⁸ In this situation, the common law’s mere survivorship rule applies. In addition, the Code adopts as a default rule of construction the same durational survivorship technique for all types of gratuitous transfers including wills and all other governing instruments.¹²⁹ Whereas the survivorship requirement is conclusive in intestacy, when wills or other dispositive instruments are involved, the requirement may be controlled by the instrument.¹³⁰

Although questions of the time of death might still present a problem, the 120-hour rule will substantially reduce litigation over who has survived and avoid multiple administration of the same property where it is totally unnecessary.

H. Advancements

At common law, an heir’s intestate share would be affected if the heir received an advancement from the intestate during the latter’s lifetime. By common law definition, an advancement meant an irrevocable inter vivos gift of money or property, real or personal, to a child by a parent that enables the child to anticipate the child’s

125. *Id.*

126. *See, e.g.,* Janus v. Tarasewicz, 482 N.E.2d 418 (Ill. App. Ct. 1985); *In re Bucci*, 57 Misc. 2d 1001 (N.Y. Surr. Ct. 1968); Schmitt v. Pierce, 344 S.W.2d 120 (Mo. 1961).

127. U.P.C. § 2-104 (1990) (amended 1993).

128. *Id.*

129. *Id.* § 2-702.

130. *Id.* § 2-702(d).

inheritance from the parent, to the extent of the gift.¹³¹ The principal question raised when there has been an inter vivos gift by a donor to a prospective heir is whether the gift is intended as an advancement. Because the intent of the donor at the time of the gift is the determinative factor, not all such gifts are so characterized. Seldom, however, does one find that a donor has clearly indicated that intent. The transferring document, if there even is one, will seldom specifically indicate one way or the other. The result has been that the question of what constitutes proof of this intent has caused a substantial amount of litigation.¹³²

Under the Code, a gift is an advancement only if any one of several formalities is satisfied.¹³³ A gift is a formal advancement if either the donor "declared in a contemporaneous writing" or the heir "acknowledged in writing" that the gift is an advancement.¹³⁴ The required writing may, rather than declaring the gift is an advancement, merely indicate that the gift must be taken into account in computing the division or distribution of decedent's intestate estate.¹³⁵ No words of art such as "advancement" must be used by the donor. There is also no specific requirement that the written declaration of intent to make a formal advancement has to be communicated to the donee at the time of the gift.¹³⁶

Arkansas's provision is virtually identical to the original Code.¹³⁷ It does not, however, require that a writing by the decedent indicating a gift or an advancement be "contemporaneous."¹³⁸ It also does not contain the language that allows an advancement to a recipient who predeceases the intestate to be used in calculating the shares of the recipient's descendants if the writing or acknowledgment so provides.¹³⁹

The formality requirements coincide with modern estate planning practice and theory, because most gifts today are not thought of

131. ATKINSON, *supra* note 33, § 129.

132. See Mary L. Fellows, *Concealing Legislative Reform in the Common—Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 Vand. L. Rev. 671 (1984).

133. U.P.C. § 2-109 (1990) (amended 1993).

134. *Id.* § 2-109(a)(i).

135. *Id.* § 2-109(a)(ii).

136. The advancement may even take some form other than an outright gift. See *id.* § 2-109.

137. ARK. CODE ANN. § 28-9-216 (Michie 1987).

138. The statute deletes the phrase "in a contemporaneous writing" that is found at U.P.C. § 2-109(a)(i) (1990) (amended 1993).

139. Compare U.P.C. § 2-109(c) (1990) (amended 1993) with ARK. CODE ANN. § 28-9-216(c) (Michie 1987).

as transfers in anticipation of an inheritance. The rules alleviate the evidentiary problem of proving intent by requiring that the intent be in writing. Frequent litigation attempting to discover a decedent's intent is precluded by the requirement of a writing. The writing could be a contemporaneous written note or an indication that the gift is a formal advancement, which is included with the donor's personal records. Of course, the writing must be available or provable after the donor's death when distribution decisions are made.

I. Debtor Heirs

How should intestacy law treat an heir who is indebted to the decedent at the time of death? Arkansas's provision is virtually identical to the Code with only insignificant differences in wording.¹⁴⁰ Under both provisions, the debt owed to the estate by a debtor-heir is to be charged against the heir's intestate share.¹⁴¹ The debt is not to be charged against the share of the debtor-heir's descendants if the debtor-heir fails to survive the decedent.¹⁴²

IV. TESTAMENTARY EXECUTION

A. General Considerations on Wills

A fundamental device for distributing wealth upon death is the will. Presently, a will is a creature of statute.¹⁴³ To constitute a valid will, these statutory provisions customarily require that a will must: (1) be voluntarily executed; (2) be executed by a competent person; (3) appear in a written or other specifically approved form; (4) be intended to take effect only after the testator's death; and (5) dispose of property, or make other directions, or both.¹⁴⁴ Wills are also characteristically ambulatory and revocable.¹⁴⁵ They are ambulatory in the sense that they apply to the situation that exists at the testator's death rather than that which was present at the time of the exe-

140. ARK. CODE ANN. § 28-9-217 (Michie 1987); U.P.C. § 2-110 (1990) (amended 1993).

141. ARK. CODE ANN. § 28-9-217 (Michie 1987); U.P.C. § 2-110 (1990) (amended 1993).

142. *See also* ARK. CODE ANN. § 28-9-217 (Michie 1987); U.P.C. § 2-110 (1990) (amended 1993).

143. ALISON REPPY & LESLIE J. TOMPKINS, *HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS* 48 (1928).

144. *See* 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* § 1.2 (3d ed. 1960).

145. ATKINSON, *supra* note 33, § 1, at 2.

cution.¹⁴⁶ Wills are also revocable by a competent testator who follows the proper revocation procedure. Although all jurisdictions by statute provide methods for making and revoking wills, execution requirements unfortunately vary greatly between them.¹⁴⁷ This lack of uniformity results in a serious lack of predictability for persons whose estates cross state lines or who change domiciles during their lives.

All will statutes require certain formalities for execution of attested wills. Several purposes have been identified for these formalities including purposes to protect and safeguard the testator, to provide reliable proof and evidence, to provide an event that emphasizes the finality of intent and of the act of execution, to result in a document that will receive the anticipated legal response and recognition, and to provide administrative judicial efficiency.¹⁴⁸ These purposes present a good case for requiring certain formalities to take place before one should be said to have satisfied the requirements. Considering the solemnness, importance, and finality of a will, it has been common for states to set out elaborate formalities necessary to be followed in order to satisfy and to produce a recognizable and valid will.

Generally, a will is an intent-enforcing type of document. The goal of the instrument is to identify and explain the desires of the testator. It is assumed that if these desires and intent are adequately expressed, they will be obeyed. The difficulty is that they have no effect and are a nullity unless the instrument can be proven and thereby probated. To probate a will successfully, one must satisfy the execution formalities set out in the statute that recognizes a will as a transfer device. The dilemma created by legal formalities is that if a formality is not obeyed and it is considered a crucial formality, the failure to satisfy the formality may cause the instrument to fail and thus cause an intent-denying rather than intent-enforcing result.¹⁴⁹ Consequently, formalities ought to be designed to provide safeguards, but not to strike down documents obviously intended to have legal effect. Finding that middle ground is the goal. Through a series of provisions, the Code finds that dividing line.¹⁵⁰ Unfortunately, Arkansas's present statutes on execution of

146. ATKINSON, *supra* note 33, § 1, at 2.

147. See AMERICAN COLLEGE OF TRUSTS & ESTATES COUNSEL, STUDY # 1, WILLS REQUIREMENTS OF VARIOUS STATES (1995).

148. Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1 (1941); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

149. See, e.g., *In re Pavlinko's Estate*, 148 A.2d 528 (Pa. 1959).

150. See U.P.C. §§ 2-502 to -513 (1990) (amended 1993).

attested wills impose maximum formalities and thus may have intent-defeating consequences.¹⁵¹

The Code's will provisions have three primary objectives: (1) to make the execution requirements for wills uniform among the jurisdictions; (2) to reduce execution requirements to their indispensable minimum; and (3) to validate as often as possible instruments purporting to be wills. For basic validity, the Code recognizes four separate and alternative will execution techniques, the successful satisfaction of any one of which produces a probatable will in a Code state. For convenience, the four techniques result in four types of wills called the ordinary witnessed will,¹⁵² the holographic or handwritten will,¹⁵³ the foreign will,¹⁵⁴ and the international will.¹⁵⁵ The Code also includes a special procedure for executing a fifth kind of will called the self-proved will, which, although not essential for basic validity, is useful to follow for purposes of easing proof of execution requirements in contested will cases.¹⁵⁶

Both Arkansas law and the Code 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.

151. See ARK. CODE ANN. § 28-25-103 (Michie 1987).

152. U.P.C. § 2-502(a) (1990) (amended 1993).

153. *Id.* § 2-502(b).

154. *Id.* § 2-506.

155. U.P.C., art. II, pt. 10 (1990) (amended 1993).

156. *Id.* § 2-504.

B. The Ordinary Witnessed Will

The Ordinary Witnessed Will	
Under Arkansas Law	Under U.P.C.
Testator — age of eighteen ¹⁵⁷	“Any person 18 or more years of age” ¹⁵⁸
Testator — “of sound mind” at time of execution ¹⁵⁹	“of sound mind” ¹⁶⁰
A will or instrument ¹⁶¹	“in writing” ¹⁶²
Signed by testator — the intended signature or proxy in his presence and by his direction — the proxy must write own name and state he or she signed at testator’s request ¹⁶³	“signed by testator or in testator’s name by some other individual in the testator’s conscious presence and by the testator’s direction” ¹⁶⁴
Signed (signature) “at the end” of the will ¹⁶⁵	[No similar requirement — may be signed anywhere on will]
Witnesses — “two or more attesting witnesses” ¹⁶⁶	“two individuals” ¹⁶⁷
Witnesses — “competent to be witness generally” ¹⁶⁸	“An individual generally competent” ¹⁶⁹

157. ARK. CODE ANN. § 28-25-101 (Michie 1987).

158. U.P.C. § 2-501 (1990) (amended 1993).

159. ARK. CODE ANN. § 28-25-101 (Michie 1987).

160. U.P.C. § 2-501 (1990) (amended 1993).

161. ARK. CODE ANN. § 28-25-103 (Michie 1987).

162. U.P.C. § 2-502(a)(1) (1990) (amended 1993).

163. ARK. CODE ANN. § 28-25-103 (Michie 1987).

164. U.P.C. § 2-502(a)(2) (1990) (amended 1993).

165. ARK. CODE ANN. § 28-25-103 (Michie 1987).

166. *Id.*

167. U.P.C. § 2-502(a)(3) (1990) (amended 1993).

168. ARK. CODE ANN. § 28-25-102 (Michie 1987).

169. U.P.C. § 2-505(a) (1990) (amended 1993).

Witnesses — disinterested — no direct “beneficial interest by way of devise” ¹⁷⁰	[No disinterested requirement]. “The signing of a will by an interested witness does not invalidate the will or any provision of it.” ¹⁷¹
Interest taken away — witness “forfeits” amount above what witness would have received had testator died intestate ¹⁷²	[Not applicable]
Testator must declare to witnesses that instrument is his will ¹⁷³	[No similar requirement]
Witnesses — attestation — authentication: Witness either the testator signing, or the testator’s acknowledgment of the signature ¹⁷⁴	Witnesses — attestation — authentication: “witnessed either the signing of the will . . . or the testator’s acknowledgment of the signature or of the will” ¹⁷⁵
Witnesses — must be requested to: ¹⁷⁶	[No “request” required]
— Sign	“signed by” ¹⁷⁷
— sign in testator’s presence:	[Not applicable]
(at end?)	[Not applicable]

Comparison: The Code reduces the formalities to a minimum without sacrificing the desired protections of formalities.

C. Holographic Wills

A holographic will is a will that is in the handwriting of the testator but which usually lacks other will formalities such as the witnessing requirement.¹⁷⁸ Approximately one-half the states have provisions authorizing holographic wills as an alternative testamentary device.¹⁷⁹ Such recognition is consistent with modern will policies,

170. ARK. CODE ANN. § 28-25-102 (Michie 1987).

171. U.P.C. § 2-505(b) (1990) (amended 1993).

172. ARK. CODE ANN. § 28-25-102 (Michie 1987).

173. *Id.* § 28-25-103.

174. *Id.*

175. U.P.C. § 2-502(a)(3) (1990) (amended 1993).

176. ARK. CODE ANN. § 28-25-103 (Michie 1987).

177. U.P.C. § 2-502(a)(3) (1990) (amended 1993).

178. ATKINSON, *supra* note 33, § 75, at 355.

179. See AMERICAN COLLEGE OF TRUSTS & ESTATES COUNSEL, *supra* note 147.

which generally increase recognition and reduce denials of probate. In addition, many of the old fears with regard to fraud and undue influence have either not materialized or are not relevant today because the holographic procedure satisfactorily protects a person from these dangers.

Although they differ, both Arkansas law and the Code recognize holographic wills. Neither statute requires that the holograph be dated, or that the signature be at the end.¹⁸⁰ The following chart outlines the basic respective requirements:

Holographic Wills	
Under Arkansas Law ¹⁸¹	Under U.P.C. ¹⁸²
Testator's "signature" and	Testator's "signature" and
"the entire body of the will"	"material portions of the document"
"shall be written in the proper handwriting of the testator."	must be "in the testator's handwriting."

Both Arkansas law and the Code provide requirements for the proof of holographic wills. Arkansas law requires that the handwriting and signature be established by the testimony of three witnesses.¹⁸³ This is too burdensome in many cases. If all the heirs agree that the holograph is valid, it seems superfluous to require more than one witness. Section 3-303 of the Code permits the will to be probated informally on the basis of a sworn statement or affidavit of one witness; in a formal testacy proceeding the amount of proof depends on whether the probate is contested.¹⁸⁴ Thus, if

180. 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 Historical Soc'y & Museum, 257 Ark. 394, 516 S.W.2d 882 (1974) (name was not intended to be a signature) *with* Smith v. MacDonald, 252 Ark. 931, 481 S.W.2d 741 (1972) (name in body of the will constituted a signature). The Arkansas court is liberal in admitting evidence of testator's declarations and the surrounding circumstances on this issue.

181. ARK. CODE ANN. § 28-25-104 (Michie 1987).

182. U.P.C. § 2-502(b) (1990) (amended 1993).

183. ARK. CODE ANN. § 28-25-104 (Michie 1987).

184. U.P.C. § 3-303 (1990) (amended 1993).

there is no contest, under section 3-405, the court may allow probate on the basis of the sworn petition alone.¹⁸⁵ If there is doubt about the handwriting, a contest is likely, and expert testimony will probably be obtained anyway.

Comparison: Significantly, the Code neither requires that a holographic will be dated nor prescribes the location of the testator's signature. The Code's "material portions" terminology must be compared to the "entire body" terminology found in the Arkansas statute. The Code's terminology is specifically intended to counteract strict statutory constructions applied by some courts to the words "entirely written."¹⁸⁶ These courts have held holographic wills invalid if they contain any printed matter on their faces provided that the testators intended the printed matter to be a part of the wills.¹⁸⁷ By contrast, the "material portions" terminology should permit a holding of validity for a holographic will executed on a printed will form if the printed portions can be eliminated and if the handwritten portions still adequately describe the testator's testamentary scheme.¹⁸⁸ In addition, if the material portions of a will are in the testator's handwriting, the Code specifically allows printed portions of the will to be used to show testamentary intent.¹⁸⁹

D. Dispensing Power and the Substantial Compliance Doctrine

Because the validity or invalidity of an instrument such as a will is so important to the distribution of an estate, the determination of validity has been a highly litigated issue. Opponents of wills are likely to offer any reason to deny probate. Consequently, the formalities of the execution statute have been a fertile breeding ground for these arguments. Courts that face this litigation are put in a policy bind. On the one hand, the court is conscious and respectful of legislative intent as expressed in the appropriate wills statute. If the legislature has set out a particular formality to follow,

185. *Id.* § 3-405.

186. *Id.* § 2-502 cmt.; see ATKINSON, *supra* note 33, § 75. In addition, in 1990 the Code changed the original phrase from "material provisions" to "material portions" in order to prevent restrictive interpretations of this approach.

187. See Jay M. Zitter, Annotation, *Requirement that Holographic Will, or its Material Provisions, be Entirely in Testator's Handwriting as Affected by Appearance of Some Printed or Written Matter Not in Testator's Handwriting*, 37 A.L.R.4th 528 (1985).

188. U.P.C. § 2-502(b) cmt. (1990) (amended 1993). *But see, e.g., In re Johnson*, 630 P.2d 1044 (Ariz. Ct. App. 1981) (after excusing printed material, handwritten remainder failed to express testamentary intent).

189. U.P.C. § 2-502(c) (1990) (amended 1993).

it is not for the court to ignore. On the other hand, the invalidation of a will because of a failure on the part of the testator to conform to a technical formality may appear extremely picayune and callous when the result is contrary to the clearly expressed and finalized intent of the testator.

Generally, courts have followed the concept of strict construction, *i.e.*, an instrument must satisfy all the formalities set out in the statute.¹⁹⁰ Consequently, when analyzing the validity of the instrument, one has to dissect the statute word by word to see what the formalities are and whether they have been satisfied. To ensure that the policy of strict construction is kept within its legitimate domain, courts have adopted the doctrine that formalities, other than those required by the statute, will not be added. Generally, one must only satisfy the formalities required and no more.¹⁹¹ In addition, courts do not object to greater formalization than the statute requires.

Even where strict construction is the court's philosophy, some have been willing to ignore or to interpret generously some incidental formalities in the statutes.¹⁹² For example, a statute might require the testator to "request" the witnesses to witness the will. The word "request" may be liberally interpreted to mean the circumstances must indicate that the testator wanted the witnesses to witness the will. The testator need not have actually verbally requested the witnesses to do so.¹⁹³ This might be referred to as a reasonable compliance standard for these incidental formalities. Arkansas has followed this approach.¹⁹⁴

It is difficult, however, to distinguish between a formality that is going to receive a strict construction versus one that will receive a reasonable construction. In addition, experience informs us that

190. See 2 PAGE, *supra* note 144, § 19.4. "Whether the courts profess to follow the harsher rule, or whether they profess to follow the milder rule, they generally agree on the result which they reach. The testator must perform each of the acts which is required by the statute in order to execute a valid will; and the courts rarely require more." 2 PAGE, *supra* note 144, at 68.

191. See, *e.g.*, Lemayne v. Stanley, 3 Lev. 1 (1691) *but cf.* Estate of McKellar's, 380 So. 2d 1273 (Miss. 1980).

192. See, *e.g.*, *In re Demaris Estate*, 110 P.2d 571 (Or. 1944), where the court adopted the "conscious presence" test to satisfy the requirement that the witnesses must sign in the testator's presence. The "conscious presence" test has now been adopted by the Code. U.P.C. § 2-502 (1990) (amended 1993).

193. See, *e.g.*, Hollingsworth v. Hollingsworth, 240 Ark. 582, 401 S.W.2d 555 (1966).

194. See *Id.*; Hanel v. Springle, 237 Ark. 356, 372 S.W.2d 822 (1963); Tatum v. Chandler, 229 Ark. 864, 319 S.W.2d 513 (1958); Orr v. Love, 225 Ark. 505, 283 S.W.2d 667 (1955).

it is unlikely that courts will, on their own, adopt a more reasonable approach with regard to most formalities set out in will statutes.¹⁹⁵ Consequently, a statutory substantial compliance approach or dispensing power is essential.¹⁹⁶

The Code contains a dispensing power provision.¹⁹⁷ Its provision permits a court to dispense with one or more statutory formalities even if they have not been followed, so long as the proponents of the document or writing establish by clear and convincing evidence that the testator intended the document to constitute the decedent's will or other will-related instructions.¹⁹⁸ The provision is unspecific as to which formalities may be dispensed. With the exception that

195. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975). Cf. *In re Ranney*, 589 A.2d 1339 (N.J. 1991) (allowing relief, although the court applied a literal interpretation to its wills act requirements under a separate court-developed substantial compliance doctrine that permits formal probate of a document despite execution deficiencies if clear and convincing evidence shows substantial compliance with the statutory requirements).

196. The proper place and scope of formalities in executing wills has become a cause celebre in recent legal literature. See, e.g., Langbein, *supra* note 195, at 489 (proposing a substantial compliance doctrine for wills); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541 (1990) (abolishing the attestation by witnesses requirement); James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009 (1992) (contending that proof of testamentary intent is the key, not procedural techniques or physical attributes); Lydia A. Clougherty, Comment, *An Analysis of the National Advisory Committee on Uniform State Laws' Recommendation to Modify the Wills Act Formalities*, 10 PROB. L.J. 283 (1991) (opposing the "substantial compliance" doctrine). Cf. Gerry W. Beyer, *The Will Execution Ceremony—History, Significance, and Strategies*, 29 S. TEX. L.J. 413 (1987) (detailing the critical importance of the will execution ceremony and setting forth proper will execution technique). There is legitimate concern that when wills execution statutes mandate only "bare-bones" requirements, the legitimacy of some of the retained requirements is subject to question. For example, if the testator does not have to sign in the presence of witnesses, and the witnesses do not have to sign in the presence of the testator, then the continued attestation of witnesses is hardly justifiable. Cf. JOHN RITCHIE ET AL., *CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 277 n. 18 (8th ed. 1993). What might make the witnessing requirement worthy of retention is the ritual function of formalities and its psychological benefits. See Beyer, *supra*. The effort to eliminate rejection of wills because of technical formality errors has reached England and New Zealand. See R.T. Oerton, *Dispensing With the Formalities*, 141 NEW L.J. 1416 (1991); Rosemary Tobin, *The Wills Act Formalities: A Need for Reform*, 1991 NEW ZEALAND L.J. 191. The issue has also been rekindled in Queensland, Australia, one of the first jurisdictions to enact the "substantial compliance" concept to wills validation. See John K. de Groot, *Will Execution Formalities—What Constitutes Substantial Compliance?*, 20 QUEENSLAND L. SOC'Y J. 93 (1990).

197. U.P.C. § 2-503 (1990) (amended 1993). The Editorial Board of the Uniform Probate Code states that one of the themes to probate law sounded in the last twenty years is "the decline of formalism in favor of intent-serving policies." U.P.C., art. II, prefatory note (1994).

198. U.P.C. § 2-503 (1990) (amended 1993).

there must be a document or a writing added upon a document, all other formalities are subject to the dispensing remedy. Arkansas has no comparable provisions.

Comparison: The Code provides a remedy where current Arkansas law is silent. An example of this would be a will that requires two witnesses, but the testator only obtained one witness.¹⁹⁹ If the standard of proof could be met, a court could dispense with the second witness and permit the will to be probated. This provision does not encourage testators to disregard the letter of the execution statutes; it merely provides a remedy in those cases where a rejection of the will causes significant intent-denying results to occur despite the available proof of that intent. The purpose of the provision is to convert ineffective attempts at finalized intent into effective, finalized plans if the standard of evidence can be satisfied; it is not designed to convert incomplete plans into finalized plans.²⁰⁰

E. Self-Proved Will

Arkansas allows use of an affidavit by the attesting witness in lieu of direct testimony, but only in an uncontested probate.²⁰¹ The Code includes a separate and more formalistic technique for executing wills called the "self-proved will."²⁰² It is similar to the procedure for an ordinary witnessed will but includes a notarized affidavit executed by the testator and the witnesses.²⁰³ It also adds to the ordinary witnessed will execution process the following three execution formalities: (1) the testator must declare to the witnesses that the will is the testator's last will; (2) the witnesses must sign as witness to the will; and (3) the witnesses must sign in the testator's presence and hearing.²⁰⁴

199. In exploring situations in which the dispensing power might be exercised, consider the fact situation in *Smith v. Nelson*, 227 Ark. 512, 299 S.W.2d 645 (1957). Decedent died with a typewritten will signed by only one witness, and two handwritten and signed letters referring to the will and its content. The court denied the will probate because it failed to satisfy execution statutes and denied the letters probate because they lacked testamentary intent. Considering the proof of the clear and undisputed intent of the decedent, the facts of this case exhibit an excellent opportunity to apply the Code's dispensing power.

200. AVERILL, *supra* note 5, at 131. Considering the uniqueness of wills validity situations, the dispensing power will be exercised on a case by case basis. Decisions on this issue will generally be too factually restrictive and therefore not provide precedent for later cases.

201. ARK. CODE ANN. § 28-25-106(d) (Michie 1987).

202. U.P.C. § 2-504 (1990) (amended 1993).

203. *Id.* § 2-504(b).

204. *Id.* § 2-504(a).

Forms for two alternative affidavits are included in the Code. The first affidavit form permits the self-proved will affidavit to be a part of the will itself and actually constitutes the execution thereof.²⁰⁵ In using this form, the testator and the witnesses execute the affidavit and the will simultaneously.²⁰⁶ The second affidavit form is to be executed separately from and subsequently to the execution of the ordinary witnessed will.²⁰⁷ When using this form, the testator and the witnesses execute the will separately and then subsequently, in a continuous or separate proceeding, complete and sign the affidavit.

The effect of executing a self-proved will is not very significant. In most respects, when a self-proved will is offered for probate it is subject to the same treatment as any other validly executed will. Its principal distinguishing feature is to permit the will to be admitted to probate in a formal testacy proceeding without the necessity of testimony of one of the subscribing witnesses²⁰⁸ and the signature requirement is conclusively presumed.²⁰⁹ The will, however, still is subject to contest on grounds such as revocation, undue influence, lack of testamentary capacity, fraud, and even forgery.²¹⁰ Notwithstanding its limited significance, use of one or the other of these forms should become standard practice for attorneys who draft and supervise the execution of wills.²¹¹

Comparison: The self-proved will under the Code is a much broader concept with certain procedural advantages. The advantage of executing a self-proved will is that it permits the will to be admitted to probate in a formal testacy proceeding without the testimony of one of the subscribing witnesses,²¹² as the signature requirement is conclusively presumed.²¹³ The will, however, still is subject to contest on grounds such as revocation, undue influence, lack of testamentary capacity, fraud, and even forgery.²¹⁴ The use of one or the other of these forms should become standard practice for attorneys who draft and supervise the execution of wills.

205. *Id.*

206. *Id.* § 2-504 cmt.

207. *Id.* § 2-504(b).

208. *Id.* § 3-406(a).

209. *Id.* § 3-406(b).

210. *Id.* § 3-406 cmt.; see AVERILL, *supra* note 5, § 18.02(F).

211. U.P.C. § 3-406 cmt. (1990) (amended 1993).

212. *Id.* § 3-406(a).

213. *Id.* § 3-406(b).

214. *Id.* § 3-406 cmt.

F. Choice of Law as to Execution

Under Arkansas law, a written will executed outside Arkansas is valid and probatable if it meets the requirements of either Arkansas law, the law of the place of its execution, or the law of the testator's domicile at the time of its execution.²¹⁵ This Arkansas provision does not appear to recognize a will executed in Arkansas according to the law of the testator's domicile but not valid under the law of Arkansas. There is no logic to this rule because Arkansas would recognize the will as valid if executed in any other state.

In addition to recognizing the validity of any foreign instrument that happens to be executed according to Code prerequisites, the Code also validates a will executed in compliance with the law of any of the following jurisdictions: (1) the place of execution; (2) the testator's domicile at the time of execution; (3) the testator's place of abode at the time of execution; (4) the place of the testator's nationality at the time of execution; (5) the testator's domicile at the time of death; (6) the testator's place of abode at the time of death; or (7) the testator's nationality at the time of death.²¹⁶ If an instrument is a valid will under the laws of any of these jurisdictions, then the will is valid and may be probated in a Code state.²¹⁷

In effect, if a relevant contact is satisfied, the Code literally incorporates by reference the execution statute of the relevant jurisdictions. Consequently, the execution procedures of these other jurisdictions represent additional methods of executing a proper will so long as one of the contact points is satisfied. The reference to the laws of these other jurisdictions includes all aspects of the actual execution process. The only expressed limitation imposed by the provision on this reference to the execution laws of other jurisdictions is that the will must be "written";²¹⁸ consequently, nuncupative wills are not recognized by the Code state even if recognized by the law of the jurisdiction having a relevant contact.

Comparison: The Code approach is preferred to current Arkansas law because it is broader and will validate more foreign wills.

G. Uniform International Wills Act²¹⁹

The distinction between the International Wills Act and the choice of law provision is significant. Whereas the choice of law

215. ARK. CODE ANN. § 28-25-105 (Michie 1987).

216. U.P.C. § 2-506 (1990) (amended 1993).

217. *Id.*

218. *Id.*

219. U.P.C., art. II, pt. 10 (1990) (amended 1993).

rule attempts to validate wills executed under the laws of other jurisdictions, the Act anticipates an execution intended to be valid in jurisdictions that recognize it. By following the Act, the testator selects a procedure that anticipates probate in different jurisdictions. The expectation that this execution process will be valid for probate of the will wherever necessary is greater than the expectation of the testator who, at death, happens to have an estate requiring probate in several jurisdictions. Enactment of the International Wills Act is crucial to the protection of these expectations.

Arkansas has no special provision for an international will. The Code includes the International Wills Act.²²⁰ Under the Act, the basic requirements of an international will are as follows:

(1) The will must be in writing.²²¹ This writing requirement covers any form of expression made by recognizable signs on a durable substance. Any language can be used.

(2) The testator must declare that the document is the testator's will and that testator knows its contents in the presence of three people: two witnesses and another "authorized person."²²² The contents of the will need not be revealed to these persons.

(3) The testator must sign the will (or acknowledge the signature if the testator had previously signed it) in the presence of these three persons.²²³

(4) If the testator indicates a reason for the testator's inability to sign, any other person may sign as proxy for the testator if the authorized proxy signs the testator's name at the latter's direction and makes note of this on the will.²²⁴

(5) The witnesses and the authorized person must attest the will by signing it in the presence of the testator.²²⁵ An "authorized person" is defined as a person who has been admitted to practice law before the courts of the state and who is in good standing as an active law practitioner in the state,²²⁶ or as a person who is empowered to supervise the execution of international wills according to the laws of the United States.²²⁷

The formalities are of such a protective nature that it would be of no risk to Arkansas's concepts of necessary formalities to

220. *Id.*

221. *Id.* § 2-1003(a).

222. *Id.* § 2-1003(b).

223. *Id.* § 2-1003(c).

224. *Id.* § 2-1003(d).

225. *Id.* § 2-1003(e).

226. *Id.* § 2-1009.

227. *Id.* § 2-1001(2).

adopt these provisions, particularly in an increasingly internationalized world.

H. Will Preservation and Retrieval

Both Arkansas law and the Code provide a confidential public depository system. Under rules to be established by each court, the Code provides that a testator or testator's agent may deposit a will with any court for purposes of protective preservation.²²⁸ In order to maintain confidentiality, the Code provides that only the testator or the testator's agent, authorized in writing, may obtain repossession of the will.²²⁹ Although the testator's conservator may also be allowed to examine the will, the court is to set strict procedures designed to maintain the confidentiality of the will.²³⁰ Under such procedures, for example, the conservator is not to be given possession of the will but only to be permitted to examine it.²³¹ Upon the completion of this examination, the will must be resealed and left on deposit.²³² Arkansas has a similar provision²³³ but it does not cover the conservator situation.

Under both approaches, when the court is informed of the testator's death, it is to notify any person who is designated to receive the will and to deliver the will to that person on request.²³⁴ In the alternative, the court may deliver the will to the appropriate court.²³⁵ The Arkansas provision, however, unnecessarily requires that the will be "publicly opened" thirty days after death if it is not delivered to the designated person.²³⁶

In addition, both Arkansas law²³⁷ and the Code²³⁸ contain provisions designed to force any person who has possession of a will to deliver it to the appropriate court or person. Under the Code, a custodian of a will of a testator who has died is, on the request of an interested person, under a duty to deliver with reasonable

228. *Id.* § 2-515.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. ARK. CODE ANN. § 28-25-108 (Michie 1987).

234. U.P.C. § 2-515 (1990) (amended 1993); ARK. CODE ANN. § 28-25-108(d) (Michie 1987).

235. U.P.C. § 2-515 (1990) (amended 1993); ARK. CODE ANN. § 28-25-108(d) (Michie 1987).

236. ARK. CODE ANN. § 28-25-108(d) (Michie 1987).

237. *Id.* § 28-40-105.

238. U.P.C. § 2-516 (1990) (amended 1993).

promptness any will of the testator either to a person who is able to secure its probate or to an appropriate court if no such person is known.²³⁹ Willful failure to deliver a will causes the custodian to be liable to any person who suffers damages as a consequence of that failure.²⁴⁰ A custodian may also be found in contempt of court if the custodian willfully refuses or fails to deliver a will, after being required to do so by a court order issued as a result of a proceeding specifically brought to compel delivery.²⁴¹ Arkansas law is similar except it requires that the person having custody of a decedent testator's will must deliver it to the court that has jurisdiction of the estate or to the executor named in the will.²⁴² The Code's requirement, on the other hand, is dependent on the request of an interested person.

I. No Contest or Claim Clauses

Occasionally, testators desire to discourage will contests or estate litigation by including anti-contest or anti-claim clauses in their wills.²⁴³ Litigation has arisen interpreting the validity of such clauses when devisees contest a will or file a claim against the estate.²⁴⁴ Usually the issue is whether the devisee can take a gift in the will despite the devisee's unsuccessful contest or claim against the estate.

Under current Arkansas law, a contest by a devisee to a will that includes an anti-contest clause is barred even if the contest was brought with probable cause.²⁴⁵ The Code, on the other hand, codifies the rule found in many states that an anti-contest or anti-claim clause in a will is unenforceable against an interested person if that person had probable cause to institute the proceeding.²⁴⁶ The results from these two approaches will not be different in most cases. Because the devisee obviously lost the contest, the devisee will not ordinarily be able to establish probable cause. The Code's approach provides flexibility for the particularly sympathetic case where the

239. *Id.*

240. *Id.*

241. *Id.*

242. ARK. CODE ANN. § 28-40-105(a) (Michie 1987).

243. See ATKINSON, *supra* note 33, § 82, at 408-413

244. See RESTATEMENT (SECOND) OF PROPERTY, § 9.1 reporter's note; Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary*, 23 A.L.R.4th 369 (1983).

245. *Lyle v. Zebold*, 235 Ark. 17, 357 S.W.2d 20 (1962).

246. U.P.C. § 3-905 (1990) (amended 1993); replicated in U.P.C. § 2-517 (1990) (amended 1993).

grounds for contest or claim were substantial although not evidentiarily sufficient.

V. TESTAMENTARY REVOCATION

A. Revocation Generally

An inherent characteristic of a will is the power of the testator to revoke it.²⁴⁷ Just as statutes specifically prescribe the procedure by which wills must be executed, statutes typically prescribe the procedure by which wills must be revoked. The three generally accepted revocation methods are: (1) by physical act; (2) by subsequent instrument; and (3) by operation of law due to changed circumstances.²⁴⁸ The first two methods require three principal elements that must occur concurrently: (1) an authorized act or instrument; (2) an intent on the part of the testator to revoke; and (3) a testator possessing legal capacity. Revocation by operation of law springs not from intentional acts on the document or subsequent testamentary documents but from changed circumstances between the date of the will's execution and the date of the testator's death. It springs automatically from the happening of these events. Both Arkansas law and the Code recognize and define all three of these methods.

Each revocation method creates a formality against which the testator's intent must be evaluated and compared. If the conditions of these methods of revocations are not obeyed, the will is not successfully revoked and the identifiable intent of the testator will be defeated. The best example would be a testator who has verbally expressed to others, including non-interested persons, that the testator presently revokes a previous will but the testator performs neither a physical act nor executes a subsequent revocatory instrument. Although it may be argued that because no physical act or subsequent instrument was executed the testator's intent was merely formative and not determinative, one may also conclude that the testator's intent was not followed. Consequently, as with execution formalities, revocation formalities must be limited to the minimum degree necessary to protect the purposes of the formalities.

B. Revocation by Physical Act

The Arkansas provision for revocation by physical act merely provides that a will may be revoked "[b]y being burned, torn,

247. U.P.C. § 2-507 (1990) (amended 1993).

248. ATKINSON, *supra* note 33, § 84.

cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction."²⁴⁹

Although similar in technique, the Code is more explicit in application. Under the Code, a testator may revoke a will or any part of a will by performing certain revocatory acts on the will.²⁵⁰ A revocatory act includes burning, tearing, canceling, obliterating, and destroying.²⁵¹ The revocatory act may be performed by another person if that person performs the act in the testator's conscious presence and by the testator's direction.²⁵² A "conscious presence" test was specifically adopted in order to eliminate a line of sight test some courts have applied when "in the presence" is required by the statute.²⁵³ The Code attempts to prevent restrictive interpretations of the revocatory acts by providing specifically that a burning, tearing, or canceling is a revocatory act whether or not the burning, tearing, or canceling touches the actual words of the will.²⁵⁴ This means that although some form of physical evidence of revocation must appear on the will itself, front or back, the act need not deface the printed words on the instrument. Consequently, courts must be cautious about claims of physical revocation and should require adequate proof with extrinsic evidence, including the testator's statements, if any, that the testator intended a revocatory act to constitute a physical revocation.

Comparison: Under both Arkansas law and the Code, the revocatory acts must be performed with the intent and for the purpose of revoking the will or a part of it. The Code is more explicit as to the meaning of the acts and is thus preferred.

C. Revocation by Subsequent Instrument

Under Arkansas law, a will or any part of a will is revoked "by a subsequent will which revokes the prior will or part expressly or by inconsistency."²⁵⁵

Again the Code is similar in technique but more explicit in application. Under the Code, revocation by a subsequent instrument

249. ARK. CODE ANN. § 28-25-109(2) (Michie 1987).

250. U.P.C. § 2-507(a)(2) (1990) (amended 1993).

251. *Id.*

252. *Id.*

253. *Id.* § 2-507 cmt.

254. *Id.*

255. ARK. CODE ANN. § 28-25-109(1) (Michie 1987).

is also recognized when accomplished by an instrument executed with the same formalities as any valid will.²⁵⁶ Revocation of any prior will by this method may also be accomplished in whole or in part.²⁵⁷

A commonly litigated situation concerns whether revocation occurs by execution of a subsequent will which is inconsistent in whole or in part with a prior will, but which does not specifically revoke the prior will.²⁵⁸ The proper characterizations of the relevant issues are whether the subsequent inconsistencies revoke the prior will or its provisions, or whether the prior will or its provisions are merely superseded by the subsequent inconsistent will or its provisions. Of course, if both wills are probated after the testator's death, the provisions and terms of the subsequent will prevail. If, however, the subsequent will is revoked before the testator's death, determination of whether the prior will was revoked or merely superseded is important. If the subsequent will merely superseded the prior will, revocation of the subsequent inconsistent will or its provisions reinstates the prior will or its provisions. If the prior will is held to have been revoked, however, that will or its provisions will be effective again only if re-executed or the doctrine of revival is applicable.

Under the Code, the concept of revocation by inconsistency is explained.²⁵⁹

(1) A previous will is revoked by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(2) Extrinsic evidence is admissible to prove this intent.²⁶⁰

(3) If there is no evidence, the testator is presumed to have intended revocation rather than supplementation of the previous will if the subsequent will makes a complete disposition of the testator's estate.²⁶¹ If the previous will does not make a complete disposition, the testator is presumed to have intended a subsequent will to be merely supplemental rather than revocatory of a previous will.²⁶²

256. U.P.C. § 2-507(a)(1) (1990) (amended 1993).

257. *Id.*

258. See RESTATEMENT (SECOND) OF PROPERTY § 33.2 reporter's note (1990).

259. U.P.C. § 2-507(b)-(d) (1990) (amended 1993).

260. *Id.* § 2-507 cmt.

261. *Id.* § 2-507(c).

262. *Id.* § 2-507(d).

(4) Either presumption may be rebutted on a clear and convincing standard by extrinsic evidence. If not rebutted, the presumption stands.

Comparison: The Arkansas Code provisions are similar except the Code meritoriously addresses the evidence and presumption questions.

D. Revocation by Changed Circumstances

At common law, revocation by operation of law was recognized in two situations: a single woman's will was revoked when she subsequently married, and a single man's will was revoked after his marriage and birth of an issue.²⁶³ No other change of circumstances would revoke a will by operation of law.

In Arkansas, divorce revokes provisions of a will in favor of the divorced spouse.²⁶⁴ In addition, a spouse who is convicted of first or second degree murder of his or her spouse "shall not be endowed in the real or personal" property of the decedent's estate.²⁶⁵

Under the Code, the revocatory effect of changed circumstances on wills is limited also to divorce by a spouse and to the testator's homicide by a devisee.²⁶⁶ No other change of circumstances shall be deemed to revoke a will by operation of law. Other provisions thoroughly define the meaning and scope of the key terms, "divorce" and "homicide" and what happens to the property if the revocation occurs.²⁶⁷ In addition, these revocatory consequences are applicable to inter vivos transactions as well, giving definiteness to will substitutes.²⁶⁸

Comparison: The Code is comprehensive on these matters. The uncertainty of these topics under Arkansas law leaves doubt and thereby may cause expensive litigation.²⁶⁹

263. ATKINSON, *supra* note 33, § 85.

264. ARK. CODE ANN. § 28-25-109(b) (Michie 1987).

265. *Id.* § 28-11-204.

266. U.P.C. § 2-508 (1990) (amended 1993).

267. *Id.* §§ 2-802, 2-804, 2-803.

268. *Id.*

269. *See, e.g.,* Wright v. Wright, 248 Ark. 105, 449 S.W.2d 952 (1990); Luecke v. Mercantile Bank, 286 Ark. 304, 691 S.W.2d 843 (1985).

E. Revival of Revoked Wills

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.²⁷⁰

Both Arkansas law and the Code have provisions concerning this issue. The Arkansas provision severely restricts revival to re-execution.²⁷¹ It provides that no revoked or invalid will, or part thereof, can be revived except by a re-execution of the will, or by the execution of another will in which the revoked or invalid will or part thereof is incorporated by reference.²⁷²

The Code's revival provision adopts a flexible system of contrary presumptions. Separate rules apply depending upon whether the subsequent will wholly revokes the previous will or merely partly revokes the previous will.²⁷³ If a physically revoked subsequent will wholly revokes the previous will, revival occurs only when those who seek revival present evidence that the testator intended the previous will to be revived.²⁷⁴ This puts the burden on those seeking revival of the previous will. The Code permits extrinsic evidence, including statements by the testator to be admissible to prove intent. Revival intent means an intent that the previous will is to take effect as executed. Information concerning the testator's knowledge of the contents of the previous will is relevant evidence.

With regard to a physically revoked subsequent will that only partly revokes a previous will, the Code adopts the rule that revival is presumed unless those who contend that no revival occurred introduce evidence showing the testator did not intend revival of the prior instrument.²⁷⁵ This puts the burden on those seeking nonrevival of the previous will. The Code permits extrinsic evidence, including statements by the testator, to be admissible to prove intent. If no evidence is introduced or if the evidence is inconclusive, however, the prior will is deemed to be revived. Again, extrinsic evidence, including statements by the testator, is admissible to determine the testator's intent.

270. ATKINSON, *supra* note 33, § 92; *see also* RESTATEMENT (SECOND) OF PROPERTY § 33.2 reporter's note (1990).

271. ARK. CODE ANN. § 28-25-110 (Michie 1987).

272. *Id.*

273. U.P.C. § 2-509 (1990) (amended 1993).

274. *Id.* § 2-509(a).

275. *Id.* § 2-509(b).

Comparison: The Code's approach is preferred because it is more comprehensive and is more likely to give effect to the testator's intent. Although clear as to outcome in most revival situations, the restrictive Arkansas revival provision probably denies clear intent in many cases.

VI. PARAMETERS OF THE STATUTE OF WILLS

A. General Considerations on Parameters

Several doctrines help define the will. They are each separate techniques that substitute special requirements for the formalities of the Statute of Wills. In their own way, they allow evidence or documents to be used in determining the content or meaning of an underlying will. Many states, like Arkansas, do not have statutory provisions covering all of these doctrines. The Code meritoriously gives these important concepts both meaning and recognition.

B. Incorporation by Reference

Both Arkansas law and the Code have basically the same provision. The provision permits an unexecuted document or instrument to be incorporated for specific purposes into a validly executed will.²⁷⁶ In order to avoid obvious possibilities of fraud, five prerequisites must be satisfied in order for the doctrine to apply. They include: (1) a validly executed will, (2) a distinct reference to the unexecuted document in the will itself, (3) proof that the document was actually in existence at the time of execution, (4) a showing of intent on the part of the testator to incorporate the document into the will, and (5) a showing that the document offered is the one referred to in the will.²⁷⁷ The essence of the doctrine is the determination that the testator intended to incorporate the document into the will. Both laws require that the language of the will "manifest" this intent.

Comparison: Incorporation by reference is a concept frequently used in estate planning. Its codification and elaboration are beneficial.

C. Testamentary Additions to Trusts

Both Arkansas and the Code have provisions that come from the Uniform Testamentary Additions to Trust Act (Trust Act).²⁷⁸

276. ARK. CODE ANN. § 28-25-107(a) (Michie 1987); U.P.C. § 2-510 (1990) (amended 1993).

277. ARK. CODE ANN. § 28-25-107(a) (Michie 1987); U.P.C. § 2-510 (1990) (amended 1993).

278. ARK. CODE ANN. § 28-27-101 (Michie 1987); U.P.C. § 2-511 (1990) (amended

These provisions permit the testator by will to add ("pour-over") 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.²⁷⁹ The "pour-over" may be to: a revocable trust set up during the lifetime by the testator or by some other person (such as a spouse or parent); a life insurance trust, funded or unfunded; to an irrevocable trust in existence at the testator's death; or 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. Both Arkansas law and the Code now have the revised version of the Trust Act that clarifies several points and increases the flexibility of the doctrine.²⁸⁰ The newer version is preferred.

D. Events of Independent Significance

This doctrine is generally not codified. The doctrine permits certain evidence outside the will to be admitted in order to determine who receives and what property passes under the testator's will.²⁸¹ A statement of its principle is that if a fact, be it an act or event, has significance other than to pass property at death, this significance entitles that fact to control and to determine the disposition of the property. The above principle applies regardless of whether the testator or third persons can affect the act or event subsequent to the will's execution.²⁸² Typical examples of the application of the doctrine are the common use in wills of such terms as "children," "cousins," "brothers and sisters," the "residue" and "all my property." In order to determine the meaning of each of these words or phrases, it is necessary to look at facts outside the face of the will; however, because these words have obvious significance beyond their use to pass property at death, extrinsic evidence is admitted to show their meaning.

For uniformity and clarity purposes, the Code includes a provision that codifies a broad statement of the common law rule.²⁸³ This

1993). The revised version of this Uniform Act was enacted by the 1995 Arkansas General Assembly effective to wills of persons who die after July 31, 1995. 1995 Ark. Acts 751.

279. ARK. CODE ANN. § 28-27-101 (Michie 1987); U.P.C. § 2-511 (1990) (amended 1993).

280. 1995 Ark. Acts 751 (effective to wills of persons who die after July 31, 1995); U.P.C. § 2-511 (1990) (amended 1993).

281. 2 BOWE & PARKER, *supra* note 144, § 19.34.

282. ATKINSON, *supra* note 33, § 81.

283. U.P.C. § 2-512 (1990) (amended 1993).

provision is applicable to acts or events that occur not only before or after the execution of the will, but also that occur after the testator's death. Under its test, testamentary dispositions may be controlled by these acts and events only if the latter "have significance apart from their effect upon the dispositions made by the will." Although the Code generally leaves to the court the determination of what comes within the Code's test, it does expressly state that under the test the execution or revocation of another's will constitutes such an event. This separate and specific rule permits a testator to dispose of testator's property according to the terms of another's will notwithstanding that the other's will was executed before or after the testator's will. Arkansas has no statute or case law on the subject. It would be preferable to codify the doctrine of independent significance as the Code has done.

E. References to Separate Writings

Both Arkansas law²⁸⁴ and the Code²⁸⁵ permit, under limited circumstances and with explicit restrictions, a separate writing to dispose of certain tangible personal property notwithstanding the fact that the writing does not satisfy any will execution procedure, the incorporation by reference doctrine, or the events of independent significance doctrine. The Code's requirements for such a writing are as follows:

- (1) The writing must be signed by the testator (Arkansas allows handwritten writings in the testator's hand to substitute for a signature);²⁸⁶
- (2) The items disposed of and the devisees must be described with reasonable certainty;
- (3) The items disposed of must be tangible personal property;
- (4) The tangible personal property items disposed of must not otherwise be specifically disposed of by the testator's will; and
- (5) There must be a reference to this writing in a properly executed will of the testator.

If these requirements are satisfied, it makes no difference whether the writing comes into existence before or after the execution of the will, whether the writing is actually altered by the testator after the execution of the will, or whether the writing has significance other than its effect on the dispositions made in the will.

284. ARK. CODE ANN. § 28-25-107(b) (Michie 1987).

285. U.P.C. § 2-513 (1990) (amended 1993).

286. ARK. CODE ANN. § 28-25-107(b)(2) (Michie 1987).

One important limitation on the use of this type of transfer device is that it is limited to the disposition of tangible personal property. The provision specifically prohibits the use of this device for the disposition of money.²⁸⁷ This limitation on the type of disposable property by inference also bars its use to dispose of evidences of indebtedness, documents of title, securities, and property used in trade or business.²⁸⁸

On the whole, the recognition of such a device is justified on the grounds that it is in line with the policies of giving effect to the testator's intent and of relaxing execution formalities.²⁸⁹ Considering the limitation placed upon the type and extent of property that may be disposed of in this manner, problems of fraud, duress and undue influence are not serious considerations. One of the most beneficial aspects of this provision is to provide a convenient and simple device for persons who desire to change wills frequently with respect to devises of tangible personal property and effects. This informal device appears to be popular both with clients and practicing attorneys.

VII. PROTECTIONS FOR THE FAMILY AND RESTRICTIONS ON TESTATION

A. The Family Protections

It is common for states to have statutes that attempt to financially protect a decedent's family unit. These statutes typically provide specified surviving family members of a decedent with a minimal amount of protection both from the decedent's creditors and from the decedent's own intentional disinheritance. Although these statutes come in a variety of kinds and names, they are commonly broken down into three categories: (1) homesteads, (2) exemptions, and (3) allowances. Both Arkansas law²⁹⁰ and the Code²⁹¹ contain a representative for all three categories of the above family protections.

Family protections serve two primary purposes. First, they preclude disinheritance to the extent of their monetary limitations. Second, they provide their beneficiaries with protection against a decedent's unsecured creditors—the family protections are all expressly exempt from, and are in priority to, all unsecured claims against the estate.

287. *Id.* § 28-25-107(b)(1); U.P.C. § 2-513 (1990) (amended 1993).

288. U.P.C. § 2-513 cmt. (1990) (amended 1993).

289. *Id.*

290. ARK. CODE ANN. §§ 28-39-101, -102 (Michie 1987).

291. U.P.C. §§ 2-401 to -405.

1. *Homestead*

In Arkansas, homestead rights are granted under the state constitution.²⁹² They may be claimed only by a surviving spouse and/or minor children. The constitution limits the homestead to 160 acres, provided the value does not exceed \$2,500, or to eighty acres without regard to value, if the homestead is located "outside any city, town, or village"; and to one acre, provided the value does not exceed \$2,500, or to one-fourth acre without regard to value, if the homestead is in a "city, town, or village." The surviving spouse and/or minor children are entitled to occupy the land and to receive any rents and profits derived from it during the life of the surviving spouse or the minority of the children.

The Code provides for a \$15,000 monetary homestead allowance either for the surviving spouse or, if there is no surviving spouse, an equal share of the allowance for each minor child and each dependent child of the deceased.²⁹³ The Code also includes an optional provision that coordinates its homestead allowance with any existing state constitutional homestead right tied to the family home, *i.e.*, the value of the family home is charged against the Code's monetary homestead allowance.²⁹⁴

Comparison: While the Arkansas provision may result in the awarding of a very valuable right to the surviving spouse, it is not well adapted to modern circumstances. It exists only if there is real property upon which the family resides in the decedent spouse's estate and only 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 surviving spouse cannot sell his or her homestead rights if the spouse desires to live elsewhere. Therefore, many families will not benefit from the allowance. The Code provision, on the other hand, is applicable to all its specified beneficiaries because it simply provides for a cash payment.

2. *Exempt Property Allowance*

Arkansas grants the surviving spouse the right to \$2,000 of personal property of the decedent, to be selected by her from the estate.²⁹⁵ The value is reduced to \$1,000 if the estate is insolvent.

292. ARK. CODE ANN. § 28-39-202; ARK. CONST. art. 9, §§ 4-6, 10.

293. U.P.C. § 2-402 (1990) (amended 1993).

294. *Id.* § 2-402A.

295. ARK. CODE ANN. § 28-39-101 (Michie 1987).

If there is no surviving spouse, the minor children of the decedent receive this property. And, if the decedent is survived by a surviving spouse and by one or more children who are not children of the surviving spouse, this allowance goes one-half to the surviving spouse and one-half, in equal shares, to the decedent's minor children. In addition to this property, a surviving spouse is entitled to "such furniture, furnishings, appliances, implements, and equipment" as is necessary to the use and occupancy of the dwelling, provided the surviving spouse was living with the decedent at the time of his or her death.²⁹⁶ This provision takes priority over claims by heirs and creditors.

The Code provides a \$10,000 exempt property allowance in favor of either the surviving spouse or the decedent's children if there is no surviving spouse.²⁹⁷ Significantly, the children need not be minors or dependents of the decedent. The exempt property allowances will ordinarily first be charged against household furniture, automobiles, furnishings, appliances, and personal effects.²⁹⁸ If the value of these assets, less security interest held by third parties against them, does not equal the specified monetary amount, however, the protected beneficiaries are entitled to other assets of the estate to the extent necessary to make up the difference.

Comparison: The major difference in the two provisions is the larger amount of exempt property that the Code allows. Because of the provisions allowing the surviving spouse "such furniture, furnishings, appliances, implements, and equipment," however, the Arkansas statute may sometimes result in a larger allowance. The Code 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 if the estate is insolvent or the testator has disinherited his or her children.

3. *Family Allowance*

In Arkansas, the payment of allowances for the family of the decedent are limited to \$500 and are payable only in the first two months after the death of the decedent.²⁹⁹ These payments are available only to a surviving spouse and minor children. Several other types

296. *Id.* § 28-39-101(b).

297. U.P.C. § 2-403 (1990) (amended 1993).

298. *Id.* § 3-906(a)(1).

299. ARK. CODE ANN. §§ 28-39-101(c), -102 to -105 (Michie 1987).

of allowances to a decedent's family are also provided: the surviving spouse may reside in the chief residence of the deceased spouse for two months without paying rent and during this time the surviving spouse shall have a reasonable sustenance from the decedent's estate.

If the surviving spouse's dower is not assigned during this two month period, the spouse is entitled to remain in the "mansion or chief dwelling house . . . together with the farm thereto attached" until his or her dower is assigned. Moreover, until the assignment of dower, the spouse is entitled to be awarded the rent of the real estate in proportion to his or her interest in it. Payments from the estate to minor distributees are permitted during the course of administration if the estate is solvent. Any such payment is to be deducted from the distributee's share.

For purposes of support and maintenance during the period of administration, the Code provides for the payment from the estate of a reasonable monetary allowance for the benefit of the surviving spouse, minor legal dependents and other actually dependent children.³⁰⁰ The allowance may be paid either to the surviving spouse or, if there is no surviving spouse, to the children or dependents or their guardians.³⁰¹ When a child or dependent does not live with the surviving spouse, however, the allowance may be apportioned between the surviving spouse and the child or other dependent as their respective needs require.³⁰² Any allowance may be paid in a lump sum or in periodic installments.³⁰³ A protected person's death terminates the right to the family allowance, even including approved unpaid amounts.³⁰⁴ If the estate is insolvent, an allowance cannot continue for more than one year from the decedent's death.³⁰⁵

Comparison: The Arkansas provisions are insufficient and will not accomplish what they are intended to accomplish. The Code's breadth and protective amounts meet modern needs.

B. Financial Protection for the Surviving Spouse

1. *General Considerations*

With rare exceptions, states have enacted statutes which in some manner protect the surviving spouse from disinheritance by the decedent spouse.³⁰⁶

300. U.P.C. § 2-404 (1990) (amended 1993).

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* § 2-404(b).

305. *Id.* § 2-404(a).

306. ATKINSON, *supra* note 33, § 33. These statutes can be generally and broadly

2. *The Spouse's Elective Share*

In Arkansas, a surviving spouse may elect against the decedent spouse's will to receive his or her "dower."³⁰⁷ As discussed above in the section on intestacy, dower will vary according to the nature of the property (land or personal property), the existence of descendants of the decedent spouse, and the source of the property. Where there are surviving descendants of the decedent, the surviving spouse will receive an absolute interest in one-third of his or her personalty and a life estate in one-third of decedent's land. Where there are no descendants, the surviving spouse's share increases to one-half of personalty absolutely, one-half of "new acquisitions" in fee, and one-third of "ancestral property" for life.³⁰⁸

While dower is designed to give the surviving spouse a nonbarrable share of the decedent spouse's property, it provides protection against inter vivos transfers of land only. Personal property of the decedent may be transferred without the spouse's consent, as dower attaches only to personal property which the decedent owns at death.³⁰⁹ Dower in real estate is an "inchoate" right during the decedent's life and the surviving spouse receives dower in all lands which the decedent spouse owned during marriage unless the spouse consented to the transfer.³¹⁰ In an Arkansas Supreme Court case,³¹¹ the 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 surviving spouse's rights.

The election procedure provides for notice by the clerk of the court of the right to elect within one month of the admission of

categorized into three types: statutory dower, forced share, and community property. Within each category there is a large variety of methods and combinations. Several examples include (1) the common law dower estate limited to a life interest in one-third of the decedent spouse's realty; (2) a similar interest in both realty and personalty; (3) an election in lieu of dower of a fractional fee or forced share interest in the entire estate; (4) a similar forced share interest without a dower election; and (5) a one-half interest in the community property. ATKINSON, *supra* note 33, § 33. The fractional interest among these categories range from one-third to one-half or is sometimes tied into the surviving spouse's intestate share. Depending upon the type, the shares are sometimes exempt from the decedent's creditors' claims and sometimes not exempt. They may also differ as to whether the surviving spouse must make an election against the will to obtain a share or must renounce the share in order to take under decedent's estate plan.

307. ARK. CODE ANN. § 28-39-401(a) (Michie 1987).

308. *Id.* §§ 28-11-101, -301, -305.

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

310. *Id.*

311. Richards v. Worthen Bank & Trust Co., 261 Ark. 890, 552 S.W.2d 228 (1977).

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.³¹² The right of election is personal and does not survive the spouse's death.³¹³ The guardian of an incompetent surviving spouse may exercise the election, but must be authorized to do so by the court.³¹⁴

Under the Code, dower and curtesy are abolished.³¹⁵ In addition, the Code's election applies only if the decedent was domiciled at death in the Code state. Otherwise the spousal protection laws of the decedent's domicile state control those rights.³¹⁶ If the domicile state's requirement is met, then the surviving spouse may elect to take a sliding scaled percentage of the "augmented estate."³¹⁷ The surviving spouse is entitled to the family protections in addition to the elective share protection.³¹⁸

The opportunity to take this elective share exists whether the decedent died intestate, testate with a will which disinherits the surviving spouse, or testate with a will which gives all or part of the estate to the surviving spouse. The decision to elect depends upon three determinations: (1) the elective share amount; (2) the determination of the augmented estate; and (3) the satisfaction of the elective share amount.

The Code adopts an accrual-type elective share.³¹⁹ The method of accrual employs a rational rising percentage scale based upon the length of the marriage.³²⁰ The elective share percentage ascends from a low of three percent of the augmented estate after the first year of marriage to a high of fifty percent of the augmented estate after fifteen years of marriage.³²¹ At the end of fifteen years, each spouse has earned a fifty percent interest at death in each of the other's entire estate. In addition, regardless of the length of the marriage, the Code includes a supplemental or minimum safety-net monetary amount of \$50,000 for a surviving spouse.³²²

312. ARK. CODE ANN. §§ 28-39-402, -403 (Michie 1987).

313. *Id.* § 28-39-405.

314. *Id.*

315. U.P.C. § 2-113 (1990) (amended 1993).

316. *Id.* § 2-202(d).

317. *Id.* § 2-202(a).

318. *Id.* § 2-202(c). See *supra* notes 293-305 and accompanying text.

319. U.P.C., art. II, pt. 2, general cmt. (1990) (amended 1993).

320. *Id.* § 2-202(a).

321. *Id.* The Code's incremental percentage accrues at the rate of three percent per year for the first ten years and then four percent per year for the next five years.

322. *Id.* § 2-202(b).

After determining the appropriate elective share, it is necessary to identify an estate against which the elective share will be computed and funded. The Code calls this estate the "augmented estate."³²³ It starts with the decedent's estate that is subject to administration through a decedent's estate and that passes at decedent's death either by intestacy or by testacy. To be fully effective, however, the spousal protection statute must take into account certain inter vivos transfers of the decedent spouse. Consequently, the Code includes in the augmented estate what it calls the decedent's nonprobate estate.³²⁴ If this strategy is not effected, persons determined to disinherit their spouses could easily transfer their assets to third persons through the use of relatively frail inter vivos transactions or of probate estate purging transfers on their deathbed or in near deathbed situations. A law that permits easy and unburdensome avoidance establishes too vast a loophole and encourages disinheritance even in the most undesirable situation.

Concomitantly, the Code prevents the surviving spouse from receiving more than the circumstances merit. Thus, the surviving spouse must include in the augmented estate both the assets derivable from the decedent as a result of the latter's death and all of the surviving spouse's personal assets including the surviving spouse's comparable nonprobate transfers to others.³²⁵ The calculated value of the surviving spouse's interests are deducted prior to the taking of assets of other beneficiaries of the augmented estate.³²⁶ These latter inclusions and deductions discourage elections by surviving spouses in marriages of short duration and where the surviving spouse has substantial personal assets. Finally, recognizing an underlying philosophy of freedom of disposition and clarity of title and ownership, the Code excludes several categories of nonmarital interests and completed lifetime transfers made by either spouse.³²⁷

In order to take the elective share, the surviving spouse must file in court and mail to the personal representative a petition for such share within nine months after the date of death or within six months after decedent's will is probated, whichever limitation last expires.³²⁸ Notwithstanding these overall limitation periods, nonprobate assets will only be included in the augmented estate if the petition

323. *Id.* § 2-203.

324. *Id.* § 2-205.

325. *Id.* §§ 2-206, 2-207.

326. *Id.* § 2-209.

327. *Id.* § 2-208.

328. *Id.* § 2-211.

is filed within nine months after the date of death. The elective share procedure requires that there be full notice and a hearing. Notice of time and place of the hearing must be given by the surviving spouse to all persons interested in the estate and to distributees and recipients whose interests will be adversely affected by the elective share petition. The court then has the responsibility for determining the elective share, its satisfaction, and the liability of recipients for contribution.³²⁹

A petition demanding the elective share may be withdrawn by the surviving spouse any time before entry of a final determination.³³⁰ In addition, the right of election is personal to the surviving spouse and cannot be exercised by anyone else before or after the surviving spouse's death; however, it may be exercised on behalf of the surviving spouse by a conservator, guardian, or agent under a power of attorney.³³¹

Comparison: The differences between the two spousal protection systems are so great that a detailed comparison would be too long for this summary. The principal differences that deserve mention are the differences in the amount of the protection and the types of assets to which the protection applies. Arkansas law is too restrictive in both regards. The Code recognizes the economic partnership of marriage and that spouses ought to be treated as economic partners in their respective spouse's assets. The Code share depends on the length of the marriage. The longer the marriage, the greater the share until it equals fifty percent. In addition, the Code addresses the real problems of spousal disinheritance by recognizing that certain lifetime transfers must be considered when and if protection is necessary. It further recognizes that surviving spouses who have significant wealth, whether obtained individually or derived from the decedent spouse, should not be able to take an undue share from the estate or disrupt an otherwise reasonable estate plan. This is the way a spousal protection provision should operate. It provides the spouse with the ability to plan an estate properly to coincide with the spousal protection provision.

C. Unintentional Disinheritance of Spouses and Children

1. *Unintentional Disinheritance of Spouses and Children*

Occasionally, the problem of disinheritance is not intentional but inadvertent. States have enacted a variety of legislation to deal

329. *Id.* § 2-211(d).

330. *Id.* § 2-211(c).

331. *Id.* § 2-212(a); *see id.* § 5-407(b)(3).

with this problem. Most states do not treat inadvertent disinheritance of the spouse any differently than intentional disinheritance. These states, like Arkansas, rely on their spousal protection statutes to resolve the problem. All states, however, have a form of the pretermitted³³² heir statute that attempts to prevent inadvertent disinheritance of a decedent's children or descendants. The Code contains a special remedy for both of these situations.

2. *Pretermitted Spouse*

Under the Code, if a surviving spouse is a pretermitted or omitted spouse, the spouse is entitled to a spouse's intestate share valued at no less than the value the spouse would have received if the testator had died intestate.³³³ The provision's facial application depends solely on whether the marriage to a surviving spouse occurred after the will was executed.³³⁴ This is not an election on the part of the surviving spouse but an intestacy right. It is not avoided merely because the spouse was a devisee under the will. The only consequence of the spouse being a devisee is that the spouse must deduct the devise from the intestacy share required by the statute.³³⁵ This intestate share is limited, however, to the portion of the testator's estate that is not devised to one or more children of the testator who were born before the marriage to the surviving spouse and who are not children of the surviving spouse.³³⁶ Devisees to children or descendants of the child who take under the antilapse provisions are also exempt from this share.³³⁷

The Code recognizes several important exceptions to this intestacy share right. First, there is no intestacy right if the will or other evidence indicates it was made in contemplation of the testator's marriage to the surviving spouse.³³⁸ Second, the testator may express an intention that the will is effective notwithstanding subsequent marriage or marriages.³³⁹ Third, the share does not apply if the testator provided for the surviving spouse by way of transfers outside the will and these transfers were intended in lieu of a testamentary

332. "Pretermission. The state of one who is pretermitted, as an heir or child of the testator. The act of omitting a child or heir from a will." BLACK'S LAW DICTIONARY 1187 (6th ed. 1991).

333. U.P.C. § 2-301(a) (1990) (amended 1993).

334. *Id.* § 2-301(a).

335. *Id.* § 2-301(b).

336. *Id.*

337. *See id.* §§ 2-603, 2-604.

338. *Id.* § 2-301(a)(1).

339. *Id.* § 2-301(a)(2).

provision.³⁴⁰ The latter intent may be shown by statements of the testator or from reasonable inferences from the nature of the transfer or other evidence.³⁴¹ The burden of proof of satisfying any or all of the exceptions is placed upon the moving party urging the application of one or more of the exceptions.³⁴²

Arkansas does not have a comparable statute. The justification for the Code's provision is that it attempts to do what most testators probably would want to do had they contemplated the prior will and the changed marital circumstances.³⁴³ In addition, the Code may reduce the number of elections made against estates under the elective share provisions.

3. *Pretermitted Children*

Except for the State of Louisiana, no jurisdiction within the United States has an effective forced kinship provision in favor of descendants and other heirs. Consequently, if one desires, one may disinherit one's children or any other blood relatives.³⁴⁴ Although this disinheritance power may be partially altered by the statutory family protections, the closest and most common facsimile to forced kinship provisions is one that protects pretermitted descendants. The general rationale behind such provisions is that it is presumed the testator did not intend to disinherit the descendant who is omitted in the testator's will. Among the states which have such provisions, their contents vary greatly as to who, when and how they are to be applied. Both Arkansas law and the Code include pretermitted heir provisions but they differ substantially.

The Arkansas provision 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.³⁴⁵ 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. The "pretermitted" child or grandchild receives his or her intestate share. The case law consistently holds that the actual intention of the

340. *Id.* § 2-301(a)(3).

341. *Id.*

342. *Id.* § 2-301 cmt.

343. *Id.*

344. ATKINSON, *supra* note 33, § 36.

345. ARK. CODE ANN. § 28-39-407 (Michie 1987).

testator is irrelevant.³⁴⁶ If a child or issue of a child is omitted, that person takes an intestate share.³⁴⁷

Because pretermitted heir statutes are intended and designed to prevent injustice and reduce will contests when unintentionally omitted heirs survive a testator, the statute should be designed to accomplish these goals. Unfortunately, some statutes that exist in non-Code states, including Arkansas, have actually produced the opposite results.³⁴⁸ Accordingly, the Code's provision contains very precise prerequisites and limitations that are designed to reduce this litigation and judicial misinterpretation.

Under the Code, conditional thresholds are established against which each applicable situation must be tested. First, the protection is limited to pretermitted children and does not protect disinheritance of other descendants and relatives.³⁴⁹ Second, the child must be born or adopted after the execution of the will that disinherits the child.³⁵⁰ Third, intent to disinherit must not appear on the "face of the will."³⁵¹ Fourth, the disinherited or omitted child must not have been provided for by transfers outside the will intended to be in lieu of a testamentary provision.³⁵² A liberal admissibility of extrinsic evidence rule is adopted in regard to proof of intent to use nontestamentary transfers in lieu of testamentary transfers. Extrinsic evidence may include the testator's declarations, the value of the transfer *vis à vis* the estate and "other evidence" that is relevant to proof of intent.

If the threshold requirements are satisfied, the omitted child must then test the section's protection against two factual circumstances. The first standard applies to situations where the testator had no children living when the will was executed.³⁵³ The second standard applies where the testator had one or more children living when the will was executed.³⁵⁴

In the first situation the omitted child born or adopted after the will was executed takes an intestate share from the estate unless

346. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977); *Hare v. First Security Bank*, 261 Ark. 79, 546 S.W.2d 427 (1977).

347. *Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977).

348. The exclusion of extrinsic evidence of the testator's intent is an example of such interpretations. *See, e.g., Armstrong v. Butler*, 262 Ark. 31, 553 S.W.2d 453 (1977); *Hare v. First Security Bank*, 261 Ark. 79, 546 S.W.2d 427 (1977).

349. U.P.C. § 2-302 (1990) (amended 1993).

350. *Id.* § 2-302(a)(1).

351. *Id.* § 2-302(b)(1).

352. *Id.* § 2-302(b).

353. *Id.* § 2-302(a)(1).

354. *Id.* § 2-302(a)(2).

the natural or adopted child's parent is "devised all or substantially all" of the estate, survives the testator, and is entitled to take under the will.³⁵⁵ The last condition concerns whether the will might have been revoked by other law.

If testator had one or more children living when the will was executed, the pretermitted child takes from the testator's estate only if one or more of those existing children at the time of the will's execution were devisees under the will and take a legal or equitable interest in the estate. If pre-will children take, the pretermitted child takes a representative pro rata share from the total value of the interests devised to the pre-existing children. The interest of the pre-existing children's devisees abate pro rata according to their respective interests. The nature of the interest accorded (e.g., legal, equitable, present, or future), to the omitted child must conform to the extent possible to the character of the devisees to the pre-existing children. In general, the character of the estate plan must be preserved to the maximum degree possible.

Comparison: The Code provisions are preferable because of their application specificity and greater reliance on testator's intent. These provisions are intended to be intent-supplementing rather than protective devices. In particular, the provision that an after-born or after-adopted child may not claim a share under the provision if the parent's will, written before the child's birth or adoption but after the marriage, left "substantially all" of the estate to the after-born child's 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.

4. *Omission Based on Mistaken Belief of Death of Child*

Another Code provision allots an after-born child's share to a child living when the will was executed, but who is omitted because the testator believed the child to be dead.³⁵⁶ Arkansas has no specific provision, but such a child would be "pretermitted," and entitled to his or her elective share. The Code adopts a specific exception to the general exclusionary evidence rule concerned with mistake in the inducement. The admissibility and sufficiency of evidence

355. *Id.* § 2-302(a)(1). The assumption of this provision is that when the post-will child's parent is the primary beneficiary of the will, that child should not be able to take a share away from that spouse. *Id.* § 2-302 cmt.

356. *Id.* § 2-302(c). The share from the estate is limited in the same manner as the share of an after-born or after-adopted child is limited. *See id.* § 2-302(a) and (b).

concerning such a belief are controlled by the general rules of evidence and burden of proof of the Code state.³⁵⁷ The provision does not protect the omitted child if the child would have been omitted had the child been alive, or if the child had been provided for by transfers outside the will intended to be in lieu of a testamentary gift.³⁵⁸

Comparison: The Code's attempt to determine the testator's intent rather than mechanically apply a rule of construction is preferable.

V. RULES OF CONSTRUCTION

A. Intent of the Testator

Inherently, a person's will, trust, or other dispositive instrument is nothing more than an amalgamation of words structured so as to communicate individual desires. In order to carry out an instrument's purposes and effects, it is necessary to ascribe a meaning to its words. When determining the meaning of words used in a will, the cardinal principle is that the subjective intent of the testator, as expressed in testator's will, if not against public policy, controls the legal effect of the will's dispositions.³⁵⁹ Consequently, a testator may ascribe a meaning to a word that is different from the word's ordinary meaning. If the testator's own meaning can be determined, it should control. When the testator's meaning cannot be determined or is inadequately expressed, the interpreters must seek the meaning of the word from other sources.

As with any area of law, there are frequently used words of art or common recurring situations. Because of the frequency of the use of these words or of the occurrence of the situations, the law must develop uniform and set definitions and interpretations. These definitions and interpretations serve two purposes: (1) they provide a rule of construction for wills where the testator's expressed intent is inadequate or lacking, and (2) they provide a set of uniform rules that drafters of wills may incorporate by reference either explicitly or implicitly. The real purpose of these Code provisions 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.

357. *See id.* § 2-601 cmt.

358. *Id.* § 2-302(b) and cmt.

359. *Cf. id.* § 2-601.

The Code not only includes a long list of general definitions that are useful for these purposes,³⁶⁰ but also incorporates rules of construction for many of the most common problems concerning will interpretation and construction.³⁶¹ Arkansas has several examples of these rules but not nearly as many as the Code. Presumably, these rules of construction are based upon what the drafters determined the typical testator would desire if the testator had expressly indicated that intent. Significantly, they do not apply if evidence indicates testator had a contrary intention.³⁶²

Because many of the rules of construction in this section are applicable only to particular types of testamentary gifts, definitions of the various classes of testamentary gifts are important. Due to the absence of definitions of these terms in the Code, the common law definitions are relevant. Generally, testamentary gifts are classified into four different categories: specific, general, demonstrative, and residuary devises.³⁶³ A specific devise is a gift of a specific item or portion of the estate. A general devise is a gift of a set value or generally described property which is to be charged against the whole estate and not a specific portion. A demonstrative devise is a gift payable out of the whole estate but which is in the first instance charged against certain parts of the estate. A residuary devise is a gift of the remainder of the estate.

B. After-Acquired Property

The Code provides that a will may pass all the testator's property owned at death and acquired by the estate after testator's death.³⁶⁴ This rule codifies a part of the ambulatory nature of wills. The provision also recognizes that decedents' estates may become entitled to property after a testator's death such as inheritance to the estate of a decedent and retirement or other post-employment benefits and awards.³⁶⁵ Under the Arkansas statute, after-acquired property passes under a will unless a contrary intention "manifestly appears" in the will.³⁶⁶ The difference is one of nuance, which most courts would ignore. Although the Arkansas statute does not contain the more

360. *See id.* § 1-201.

361. *Id.* art. II, pt. 6.

362. *Id.* § 2-601.

363. *See* 6 BOWE & PARKER, *supra* note 144, §§ 48.1-48.10; ATKINSON, *supra* note 33, § 132.

364. U.P.C. § 2-602 (1990) (amended 1993).

365. *See id.* § 2-602 cmt.

366. ARK. CODE ANN. § 28-26-102 (Michie 1987).

general presumption that the will passes all of testator's property which that person owns at death, modern courts use that presumption without statutory base.³⁶⁷

C. Choice of Law

Choice of law determinations for testamentary and other donative transfers frequently depend upon the type of property involved, the donor's domicile, and the situs of the property.³⁶⁸ Although the Code does not alter the ordinary choice of law rules, it provides the transferor with the discretion to select a local law applicable to the meaning and legal effect of the donative disposition.³⁶⁹ Under ordinary circumstances, the Code permits the transferor by the terms of the governing instrument to select and specify what local law shall be applied in determining both the meaning and the legal effect of a testamentary disposition of the transferor's property. This power in the transferor to select the controlling law is effective regardless of (1) whether the disposition is of personalty or of realty; (2) where the property is located; and (3) whether the testator was domiciled in the state whose law was selected either at the time the will was executed, at the time of death, or at any time.

The only general limitation is that the law of the selected jurisdiction cannot be contrary to the applicable public policy of the Code state.³⁷⁰ In addition, the provision specifically prohibits a locally domiciled transferor from making a choice of law that circumvents the Code's elective share³⁷¹ or family protection provisions.³⁷² Other policies that might fit within the general public policy limitation include attempts to avoid taxation, future interest rules with respect to real property, and creditor avoidance devices such as spendthrift clauses.

This provision promotes several policies of the Code. First, by permitting transferors to select the rules and laws to be applicable to their donative instruments, it improves the chances that the transferors' intentions will control the legal effect of their dispositions. Second, it aligns testamentary choice of law rules with what is

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

368. ATKINSON, *supra* note 33, §§ 94, 145.

369. U.P.C. § 2-703 (1990) (amended 1993).

370. *Id.* § 2-703 cmt.

371. *See id.* art. II, pt. 2; AVERILL, *supra* note 5, §§ 6.01-6.03.

372. *See* U.P.C. art. II, pt. 4 (1990) (amended 1993); AVERILL, *supra* note 5, §§ 8.01-8.03.

generally permitted in dealing with inter vivos transactions including trusts. The removal of differences between the way inter vivos transactions and testamentary transactions are treated is one of the goals of the Code and of recent conflict of laws theory.³⁷³ And third, the overall effect of this provision should encourage the use of the will as a dispositive device.

Arkansas courts could reach the same result without a specific statute if the Restatement is followed, but courts are not likely to do so unless the issue is competently briefed and argued by counsel familiar with conflict of laws doctrine. The Code provision is meritorious by providing the needed authority.

D. Lapse

Common law holds that when a devisee (including a legatee) died between the execution of the will and the death of the testator, the devise to that person lapses.³⁷⁴ If a devisee died before the execution of the will, the devise is void.³⁷⁵ These characterizations generate a constructional presumption providing that neither the dead devisee nor that devisee's estate can take the devise. A lapsed or void devise passes to others according to a set of other presumptions.³⁷⁶ First, the devise passes to one or more devisees named as alternative devisees including survivors of survivorship type devises such as class gifts. If no alternative devisee is named, the devise passes to the residuary devisee, if any. If no residuary devisee is named, or if the residuary devise becomes void or lapses, the devise passes by intestacy. All of these presumptions yield to a testator's expressions of contrary intent.³⁷⁷

Because lapse occurs more often than many testators have anticipated and because lapse causes disinheritance of the devisee and the devisee's relational stock, the vast majority of jurisdictions in this country have enacted what are commonly referred to as "antilapse statutes."³⁷⁸

373. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 139, 140, 263, 264 (1971).

374. 6 BOWE & PARKER, *supra* note 144, § 50.20.

375. 6 BOWE & PARKER, *supra* note 144, § 50.22.

376. ATKINSON, *supra* note 33, § 140.

377. The following methods are commonly used by testators to avert or resolve these problems: (1) a testator makes the devise to several persons as joint tenants expecting the survivorship of one or more of the joint tenants to prevent lapse; (2) a testator specifically provides for alternative devises to other persons until the likelihood of total failure of the devise is negligible; or (3) a testator uses class gifts with their built-in survivorship presumptions. ATKINSON, *supra* note 33, § 140.

378. U.P.C. § 2-603 cmt. (1990) (amended 1993).

Although called "antilapse statutes," they do not prevent lapse but actually create a statutory substitute devise to the devisee's descendants.³⁷⁹ Generally, these statutes permit the descendants of certain classes of dead devisees to stand in their ancestor's place for purposes of taking under a testator's will. They create a rule of construction that may be altered by the testator. If a testator intends for lapse to occur, it will occur and the devise will fail. None of the statutes apply to all testamentary gifts and they vary greatly in scope.

The Arkansas statute is limited to gifts to a child or grandchild of the testator.³⁸⁰ It applies to class gifts (such as a devise of property to "my children"), and applies "[u]nless a contrary intent is indicated by the terms of the will."³⁸¹ Other than this phrase, little guidance is given concerning how to resolve a large number of constructional problems.

The Code contains a comprehensive, although restricted, set of constructional rules concerned with lapse and its related problems.³⁸² Due to the multiplicity of issues that concern lapse, the Code's provisions are relatively complex.

As with other similar statutes, the Code's substitute devise protection does not apply to all devisees. This protection is only provided for (1) devisees who come within the relational classification of being a testator's grandparent or a lineal descendant of a grandparent and (2) devisees who are stepchildren of the testator or of the donor of a power of appointment exercised by the testator's will.³⁸³ If a devisee is not a person who comes within the relational umbrella or a stepchild, the common law rule of lapse applies and there is no substitute devise. For example, descendants of devisees who are uncovered relatives related by marriage or who are legal strangers would not be protected by this provision. When testator's spouse is a devisee, the spouse's descendants also are not protected by the provision. This situation is to be compared to the case when the spouse's child, a stepchild of testator, is the devisee. When the stepchild is a devisee, the stepchild's descendants are protected by the provision but if a devise is made to a surviving spouse and no one else, the spouse's descendants, including a possible stepchild, are not protected under the provision.

379. *Id.*

380. ARK. CODE ANN. § 28-26-104 (Michie 1987).

381. *Id.*

382. U.P.C. §§ 2-603, 2-604 (1990) (amended 1993).

383. *Id.* § 2-603(b).

If a devisee qualifies under the Code provision and the devise lapses, a substitute devise is created for the devisee's surviving descendants.³⁸⁴ Descendants who take the substitute devise share only the interest the devisee would have taken if the devisee had survived the testator and whatever they take, they take by representation.³⁸⁵ Significantly, only the devisee's descendants receive this substituted devise; other relatives of the devisee, such as spouses and collaterals, are not accorded a substitute devise under the provision. Furthermore, in order for the substitute descendants of deceased devisees to take under the provision, they must survive the testator by 120 hours although they need not survive the deceased devisee by any specific length of time.³⁸⁶ If descendants of a qualified devisee fail to survive, the common law rule of lapse applies and there is no substitute devise.

The Code's antilapse provision is expansive in regard to the timing of the lapse and to the types of devises covered. Its rules apply to all types of devises including specific, general, demonstrative, and residuary. It applies notwithstanding that the qualified devisee died before the testator's will was executed or died between the execution date and the testator's death.³⁸⁷ Beyond actual death of a devisee, the provision applies in all circumstances where the devisee is deemed under the Code to have predeceased the testator.³⁸⁸ The antilapse provision also specifically applies to descendants of devisees of class gifts regardless of whether common law treats the devise as lapsed or void.³⁸⁹ Class gifts include, for example, devises to one's children, siblings, cousins, and similar single generation relational groups. Because of an inherent substitute devise effect, the Code's provision does not apply to class devises such as devises to one's issue, descendants, heirs, next of kin, and other multi-generational relational groups.³⁹⁰

In a significant clarification of the law of lapse, the Code specifically applies its substitute gift protection to the exercise of powers of appointment. Under the Code, the exercise of a testamentary power of appointment is a devise and an appointee of an exercised testamentary power of appointment is a devisee.³⁹¹ Exercised

384. *Id.* § 2-603; *see id.* § 2-106.

385. *Id.* § 2-603(b)(1)(2); *see id.* § 2-106 (defining representation).

386. *See id.* § 2-702.

387. *Id.* § 2-603(a)(4)(ii).

388. *See id.* §§ 2-702, 2-801(d), 2-803, 2-804.

389. *Id.* § 2-603(b)(2).

390. *Id.*

391. *Id.* § 2-603(a)(3)-(4).

testamentary powers are protected by the substitute gift presumption if the appointee either comes within the class of being a grandparent or a lineal descendant of a grandparent or is a stepchild of the donor of a power of appointment exercised by the testator's will or a stepchild of the testator who is donee of the power.³⁹² For example, if D devised or deeded property "to T for life, remainder to G's children as T shall appoint," and T exercised the power in favor of A but A predeceased T leaving surviving descendants, A's surviving descendants would take a substitute devise if A is a member of the covered relations of either D or T. It makes no difference whether the power of appointment is a general or special power as long as the appointee's relational threshold requirement is met. The exercise may be to an individual or a class. If the substitute gift presumption applies, it does not matter that the substitute taker is not a member of the class of permissible appointees as long as the appointee is a permissible appointee and meets the relational threshold requirement.

Beyond the threshold determination of substantive relevance, one is faced with a range of application problems that run from simple to complex. The comment to section 2-603 contains excellent illustrations explaining the operation of this provision. For one interested in the complexity of lapse and its avoidance, perusal of this comment is worthwhile.

If a devise lapses and the substitute devise provisions are inapplicable, the Code has a special provision designating to whom the lapsed devise passes.³⁹³ Significantly, regardless of who the devisee is, the following rules apply to all lapsed devises. All lapsed devises other than the residuary devise become part of the residue and pass to the residuary devisees.³⁹⁴ When the residue is devised to two or more devisees and one share fails for any reason, that devisee's share passes to the other residuary devisee or devisees.³⁹⁵ This is a meritorious rule of construction because it will frequently avoid part of the estate passing in intestacy. Arkansas has a similar provision for this situation.³⁹⁶ Of course, if all the residue fails for any reason, the residuary estate passes by intestacy to the testator's heirs.

As with all the Code's rules of construction, the provision does not apply if the testator, by the terms of the will, indicates that

392. *Id.* § 2-603(b).

393. *Id.* § 2-604.

394. *Id.* § 2-604(a).

395. *Id.* § 2-604(b).

396. ARK. CODE ANN. § 28-26-104(2) (Michie 1987).

the provision does not apply. Section 2-603 sets the presumption that mere statements of survivorship such as "if he survives me" are not, "in the absence of additional evidence," sufficient indications of an intent to override the statute's presumption.³⁹⁷

In many lapse situations, no actual proof of intent will be available and the court will be left with only the words of the will to decipher. As mentioned, the Code's substitute devise presumably applies unless a contrary intent is found. When a testator uses survivorship words, however, a presumption stand-off arises: the presumption of statutory application against an expression of contrary intent. In such situations presumptions are frequently and properly used, in a sense, to break the tie. The drafters correctly contend that something has to be said to break the new tie and they opted for testator's "express contrary intent" to rebut the statutory presumption while testator's "mere words of survivorship" will not rebut it.³⁹⁸

It is clear that if the testator adequately expresses an intent to require survivorship, this expression will be given effect. The comment to section 2-603 states that "foolproof" drafting techniques of expressing a contrary intent include, for example, adding an additional phrase to a devise that states "and not to [the devisee's] descendants" or a separate clause that states "if the devisee of any non-residuary devise does not survive me, the devise is to pass under the residuary clause," or an addition to the residuary clause that states "including all lapsed or failed devises."³⁹⁹ Where or how the line is to drawn between "mere words of survivorship" and "express contrary intent" is not explained.

The Code is complex because this is a complex issue when one applies the rules to a variety of situations. Whether one agrees with all the presumptions the Code sets or not, one has to agree that the Code's attempt to resolve the primary issues that might arise is meritorious. A properly drafted instrument will never be interpreted under this provision.

E. Lapse and Will Substitutes

Many of the same issues may arise regarding the interpretation of beneficiary designations in modern will substitutes, *e.g.*, the

397. U.P.C. § 2-603(b)(3) (1990) (amended 1993). The justifications for this boil down to two primary arguments. *Id.* § 2-603 cmt. First, the statute is said to be remedial in that it favors family and thus deserves broad interpretation; second, the issue has been litigated enough to have a firm rule. The comment notes the conflict among the cases and cites several examples. *Id.*

398. *Id.* §§ 2-601, 2-603 cmt.

399. *Id.* § 2-603 cmt.

unanticipated death or failure of a named beneficiary in a governing instrument. The Code incorporates a provision that provides guidance and stability to the interpretation of these beneficiary designations.⁴⁰⁰ The Code applies the same substitute gift presumption to these designations as it does to beneficiary designations in wills.⁴⁰¹ The range of documents to which the provision applies is set out in the Code's general definitions. It applies to beneficiary designations⁴⁰² included in all insurance and annuity policies, all POD accounts, all TOD security registrations, all pension, profit-sharing, retirement and other benefit plans, and all other nonprobate transfers that occur at death.⁴⁰³ The last reference is a catch-all reference that makes the provision applicable to all nontestamentary gratuitous transfers that arise at death and that are evidenced by a governing instrument. On the other hand, it does not apply to persons who hold interests in joint tenancy with right of survivorship or to parties of multiple-party joint accounts held with right of survivorship.⁴⁰⁴

This provision gives needed substance and predictability to the many types of inter vivos documents that is lacking under current law in most states. For example, if the beneficiary designation on a life insurance policy reads: "to my spouse, but if my spouse does not survive me, to my children," but the insured is survived only by a child and a grandchild of another child that predeceased the insured, this provision creates a substitute gift for the grandchild and allows that person to share equally with the surviving child. This result is clearly in accord with the intent of most insureds.

The substantive scope and application of the provisions are the same as those matters related to lapse of devises in wills. The same protected group, timing, and types of designation are employed.⁴⁰⁵

Because of potential liability for third persons who rely on the named designations, the Code protects third persons who pay proceeds to, receive proceeds in payment for enforceable obligations from, or purchase for value, assets from the beneficiary.⁴⁰⁶ The beneficiary and other gratuitous transferees are not protected and remain liable for the proceeds received.⁴⁰⁷

400. *Id.* § 1-201(4).

401. *See id.* § 2-706.

402. *Id.* § 2-706(a)(2) & cmt.

403. *Id.* § 1-201(19).

404. *Id.* § 2-706(a)(2).

405. A perusal of the text discussing § 2-603 provides the reader with an explanation of how this provision is to be applied and to operate. *Id.* § 2-706 cmt.

406. *See id.* § 2-706(d)-(e).

407. *Id.*

Arkansas has no similar provision covering will substitutes. The Code's extension of the antilapse presumption to will substitutes is much needed for consistency and predictability.

F. Ademption and Nonademption by Extinction

The common law rule of construction regarding ademption by extinction asserts that when a specifically devised item of property is not identified as part of the testator's estate at the time of the testator's death, the devise fails.⁴⁰⁸ Although this rule is merely a rule of construction and is subject to control by the testator, many courts severely limit the proof of the testator's intent by refusing to admit extrinsic evidence of it. In these decisions, the testator's intent to override the rule must be expressed on the face of the will: the will must anticipate the problem and express a solution. For example, T's will might read, "I devise my diamond ring to A, but if I do not own a diamond ring at my death, I devise \$10,000 to A." Here, the testator has anticipated ademption by extinction and if the ring is not in the estate, A would take the \$10,000 substitute devise. Unfortunately, most testators do not anticipate ademption, and the common law rule precludes A from taking anything from the estate for the devise unless the ring is there, regardless of the testator's intent to the contrary.

Often, courts that follow the strict identity theory employ escape devices to avoid forfeiture for a devisee when the court does not believe the testator intended ademption. These devices include tracing efforts to find the asset that testator holds at death which is traceable to the asset described by the specific devise.⁴⁰⁹ This works in situations where the subject of the devise exists in testator's estate but it does not exactly conform to the devise. For example, if T devised "my 1990 Chevrolet to A" but at death owns a 1992 Cadillac, A may be able to take the Cadillac if a court is willing to trace the original devise to the currently owned asset. Arkansas adheres to the general rule that if the identical item is not in the estate, the gift is adeemed.⁴¹⁰

Another related and sometimes overlapping escape device concerns changes in form. The common law ademption rule did not cause forfeiture if the specifically devised asset merely changed in form and not in substance between the date of the will and the date of

408. ATKINSON, *supra* note 33, § 134.

409. *See, e.g., In re Estate of Watkins*, 284 So. 2d 679 (Fla. 1973) (holding that ademption not applied when securities change form due to merger or reorganization of corporation).

410. *Mee v. Cusineau*, 213 Ark. 61, 209 S.W.2d 445 (1948).

death. The asset as changed passes to the devisee. Depending on the attitude of the court toward the particular devise in question, this approach could often save a devise. For example, if T devised "my 100 shares of XYZ common stock to A," and the corporation converted the shares to preferred stock, A might successfully contend that the 100 shares of common stock had only changed form and, therefore, A should take the 100 preferred shares. Application of this approach might depend on the degree of actual change and whether the change was caused by voluntary or involuntary action by the testator. Arkansas cases generally follow common law that if the asset changes in form only, the gift is not adeemed.⁴¹¹

Current Arkansas law touches only a small part of the issue and its meaning is less than clear.⁴¹² The Code significantly alters and clarifies the common law rule concerning ademption by extinction of specific devises.⁴¹³ In a broad sense, the provision adopts a nonademption rule subject to contravention by extrinsic evidence. In other words, the provision reverses the presumption but makes the presumption rebuttable by extrinsic evidence. In addition, the provision provides specific remedies for several common ademption problems.

First, the specific devisee has a right to specifically devised property or any part of it that exists in testator's estate at death.⁴¹⁴ Concomitantly, the specific devisee has a right to assets that represent, in part or in whole, the remaining interest which the testator retains at death in the specifically devised property.⁴¹⁵ The provision delineates the following five situations as constituting a testator's remaining interest at death: (1) the unpaid balance of the purchase price, plus any accompanying security agreement, owed to the testator; (2) the unpaid amount of a condemnation award owed to the testator; (3) the unpaid fire or casualty insurance proceeds or recovery for injury to the specifically devised property; (4) the property received by foreclosure or obtained in lieu of foreclosure on a specifically devised obligation; and, (5) the real or personal property acquired by testator as a replacement for the specifically devised property.⁴¹⁶ These rules are not subject to contradiction by extrinsic evidence of testator's unexpressed intent.

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

412. See ARK. CODE ANN. §§ 28-24-101 to -102 (Michie 1987).

413. U.P.C. § 2-606 (1990) (amended 1993).

414. *Id.* § 2-606(a).

415. *Id.* § 2-606(a)(1)-(5).

416. *Id.*

Second, in contradiction to the common law rules on ademption by extinction, the Code's "nonademption" provision reverses the presumption of ademption and adopts a broad extrinsic evidence rule to permit proof of testator's intent concerning ademption. If the specifically devised property is not in the estate at the testator's death, the devisee is presumptively entitled to a general pecuniary devise equal to the value of the specifically devised property less the value of any actual portion of the devise remaining in the estate at the testator's death and of the five representative remaining interests described above.⁴¹⁷ The presumption may be rebutted either when the facts and circumstances indicate the testator intended ademption or if ademption is consistent with the testator's manifested plan of distribution.⁴¹⁸ The latter proviso permits extrinsic evidence to be admitted to determine T's intent and to permit the court to consider the entire estate plan in order to determine what the testator desired. A related concept that may be relevant to and coordinated with this nonademption rule is the Code's provision concerning abatement.⁴¹⁹

The third ademption by extinction problem for which the Code provides a rule concerns transactions made for an incapacitated testator by or with a lifetime conservator or agent under a durable power of attorney.⁴²⁰ The three specific situations covered by the provision include when a conservator or agent (1) sells the specifically devised property; (2) receives a condemnation award for the specifically devised property; or (3) receives insurance proceeds for loss of the property due to fire or casualty.⁴²¹ In all three situations, the specific devisee is entitled to a general pecuniary devise equal to the net sale price, condemnation award, or the value of the insurance proceeds.⁴²² This right exists even when the conservator has already received the amounts and has integrated these amounts into the testator's other assets. These rules are not subject to contradiction by extrinsic evidence of testator's unexpressed intent. If the testator survives a judicial termination of testator's disability for one year or more, however, the protection provided to the specific devisee by this provision is no longer applicable.⁴²³ Protecting the specific devisee from conservator and agent transactions is consistent with

417. *Id.* § 2-606(a)(6).

418. *Id.*

419. *Id.* § 3-902(a).

420. *Id.* § 2-606(b)-(e).

421. *Id.* § 2-606(b).

422. *Id.*

423. *Id.* § 2-606(d).

the concept that ademption or nonademption should be related to the testator's intent. Acts of a third person, including a testator's conservator or agent under a durable power, do not reveal the testator's desires and should not materially and unfairly affect a specific devisee's interest.

G. Accessions Regarding Devises of Securities

A substantial amount of the litigation concerning ademption by extinction has dealt with devises of securities that, between the time of the will's execution and the testator's death, have undergone changes of form such as stock splits, reformulations or other accessions.⁴²⁴ Arkansas does not have a statute to deal with these issues. The Code meritoriously provides answers to the common issues raised by such devises.⁴²⁵ The Code's provision concerns not only devises of securities, which are broadly defined to include all types of notes, stocks, bonds, and loans, but also mineral interest agreements and leases as well as "any interest or instrument commonly known as a security" and the right to purchase any of the above.⁴²⁶ The threshold requirements of the provision are:

- (1) The testator's will devised securities;
- (2) At the time the will was executed, the testator owned securities that meet the description of the devised securities;
- (3) The additional securities owned by the testator at death were acquired after the will was executed; and,
- (4) The additional securities owned by the testator at death were acquired as a result of the testator's ownership of the devised securities.⁴²⁷

It makes no difference whether the devise is characterized as specific or general.⁴²⁸

If these conditions are satisfied, the devisee, in addition to being entitled to as many of the shares of the devised security as are part of the estate at the testator's death, is entitled to additional or other securities in the following three situations: (1) the additional securities of the same entity were issued by reason of action initiated by the entity but not including securities acquired by the exercise of purchase options; (2) securities of other entities are the result of a merger,

424. For a typical example, see *Estate of Watkins*, 284 So. 2d 679 (Fla. 1973).

425. U.P.C. § 2-605 (1990) (amended 1993).

426. *Id.* § 1-201(43).

427. *Id.* § 2-605(a).

428. *Id.* § 2-605 cmt.

consolidation, reorganization, or other similar action; or (3) securities of the same entity are acquired as the result of reinvestment.⁴²⁹

There are exclusions from the protective rule. Cash distributions prior to death are not part of the devise.⁴³⁰ This limitation means that distributions such as cash dividends declared prior to death, although not paid until after death, are not part of the specific devise.⁴³¹ The provision also does not apply to nonsecurity devises that may be subject to accessions. The comment states that the section is not intended to be exclusive as to accessions affecting securities and assumably it would not preclude similar accession interpretations in regard to other nonsecurity devises that raise similar problems.⁴³²

H. Ademption by Satisfaction

The ademption by satisfaction doctrine is the testamentary counterpart of the advancement doctrine under intestate succession. This common law doctrine provides that a general or residuary devise is adeemed, in whole or in part, when a testator makes an *inter vivos* gift to the devisee after the execution of the will.⁴³³ As with advancements, the purpose of the doctrine is to prevent a devisee from receiving a double share.⁴³⁴ Although its application in any situation depends on proof of the testator's intent, that intent is difficult to judicially establish. When intent is not clearly manifested, courts use presumptions to settle the issue. Under some circumstances a gift might be presumed to be satisfaction; under another situation, it might be presumed to be an unencumbered gift. Unfortunately, the presumptions have not been applied with any significant degree of consistency.

Arkansas has no specific provision concerning ademption by satisfaction. The Code codifies the common law ademption by satisfaction doctrine and formalizes its proof requirements.⁴³⁵ Paralleling its provision concerning advancements, the Code provides that a gift is satisfaction of a devise only if one of several formalities is satisfied.⁴³⁶ A gift is a formal satisfaction if either (1) the will

429. *Id.* § 2-605(a)(1)-(3).

430. *Id.* § 2-605(b).

431. *Id.* § 2-605 cmt.

432. *Id.*

433. ATKINSON, *supra* note 33, § 133.

434. ATKINSON, *supra* note 33, § 133.

435. U.P.C. § 2-609 (1990) (amended 1993).

436. *Id.* § 2-609(a).

provides for the deduction, (2) the testator declared so "in a contemporaneous writing," or (3) the devisee "acknowledged in writing" that the gift is in satisfaction of the devise.⁴³⁷ The required writing may, rather than declaring the gift is in satisfaction, merely indicate that the gift is to be deducted from the value of the devise.⁴³⁸ No words of art such as "satisfaction" need to be used by the testator. The gist of the declaration must indicate that the testator intended the gift to constitute what lawyers call a gift in satisfaction of a devise. It is also not specifically required that the written expression of intent to make a formal satisfaction be communicated to the devisee at the time of the gift.⁴³⁹ A qualified formality could be a contemporaneous written note or indication that the gift is a formal satisfaction that is included with the testator's personal records. The writing must be available or provable after the testator's death when distribution decisions are made. It cannot be a blanket written statement that attempts to categorize future gifts as satisfaction.⁴⁴⁰

Several other features of the Code's provision deserve mention. There is no requirement that the gift must be made to the devisee: if the formality is satisfied and the necessary intent is declared, a gift to someone other than the devisee will be satisfaction of the devise.⁴⁴¹ Although required by common law, the Code does not require that the relevant actions take place in a certain chronology. Formal satisfaction might be accomplished before the will is executed, although most cases will concern the reverse chronology. The comment states that formal satisfaction need not necessarily be an outright gift.⁴⁴² Other will substitutes, such as life insurance payable to the devisee, may constitute a satisfaction under the Code.⁴⁴³

The Code specifically provides that where a devisee of a formal satisfaction fails to survive the donor, the formal satisfaction affects the share that the devisee's descendants take from testator's estate if the descendants take as substitute devisees under the Code's antilapse provisions, unless the testator's contemporaneous writing expressly provides that the gift is not to affect the descendants' devise.⁴⁴⁴ This is the opposite rule from the Code's advancement provision. The distinction is justifiable on the basis that satisfaction

437. *Id.*

438. *Id.* § 2-609 cmt.

439. *Id.*

440. *Estate of McFayden v. Sample*, 454 N.W.2d 676 (Neb. 1990).

441. U.P.C. § 2-609 cmt. (1990) (amended 1993).

442. *Id.*

443. *Id.* § 2-609 cmt.

444. *Id.* § 2-609(c); *see id.* §§ 2-603, -604.

concerns the testator's intent whereas advancement concerns intestacy and therefore legislative intent. The gift in satisfaction does not affect the devisee's descendants if they take as alternative devisees unless the testator's contemporaneous writing expressly provides that the gift affects that descendants' devise.⁴⁴⁵

Valuation of formal satisfaction is determined as of the time of the devisee's possession or enjoyment or as of the testator's death, whichever occurs first.⁴⁴⁶

I. Right of Nonexoneration

At present, Arkansas follows the common law rule of exoneration.⁴⁴⁷ The specific devisee can force the personal representative to pay off any "secured debt" out of general assets of the estate (the "residue").⁴⁴⁸ 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 Code succession pattern which assures the surviving spouse of all or a major share of the estate.⁴⁴⁹ Under the Arkansas statute, it is hard to determine when a testator has "provided otherwise" by his or her will. If the specific devise is of "all of my right, title and interest in the following real property," has the testator indicated an intent to devise only the equity subject to outstanding mortgages?

Under the Code, the common law rule of right of exoneration of a mortgage on specifically devised real and personal property is abolished regardless of a general directive in the will to pay debts.⁴⁵⁰ Consequently, property specifically devised is distributed subject to any mortgage interest attached to it that exists at the testator's death.

Which rule is preferred depends on what one believes the average testator would desire. The nonexoneration rule of the Code is an easier rule to administer simply because the creditor on long-term obligations like mortgages usually relies on his security interest rather than the personal obligation of the decedent.

J. Powers of Appointment

Despite their importance to estate planning practices, legislation generally ignores powers of appointment and the legal issues related

445. *Id.*

446. *Id.* § 2-609(c).

447. ARK. CODE ANN. §§ 28-53-105, -113 (Michie 1987).

448. *Id.* § 28-53-113.

449. U.P.C. § 2-102 (1990) (amended 1993).

450. *Id.* § 2-607.

to them. Arkansas has joined in this neglect. The Code, in a series of scattered provisions, addresses some of the more important matters.⁴⁵¹

There are several types of powers that are relevant to the Code's provisions.⁴⁵² First, a general power is defined as a power that permits the donee to appoint the property to the donee personally, to the donee's creditors, to the donee's estate, or to creditors of the donee's estate.⁴⁵³ If a power contains no restriction on whom may be an appointee, it is presumed the power is a general power.⁴⁵⁴ Second, a nongeneral power, or what is sometimes called a special power, is unhelpfully defined by the Restatement as any power that is not a general power.⁴⁵⁵ Usually the donee of a nongeneral power is permitted to appoint only to a particular group of persons, such as one's children or descendants. Because of federal gift and estate tax benefits, nongeneral powers may include as objects everyone except the donee, the donee's creditors, the donee's estate, and the creditors of the donee's estate.

Powers are also categorized as to when they may be exercised.⁴⁵⁶ A power of appointment is presently exercisable if the donee may immediately exercise it at the time in question.⁴⁵⁷ It is stated that the donee may exercise it by deed.⁴⁵⁸ A "deed" is merely any legally operative act or instrument effective during the donee's lifetime. A power of appointment is not presently exercisable if it may only be exercised by a will (testamentary power) or at the time in question

451. A power of appointment is the "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interest in property." RESTATEMENT (SECOND) OF PROPERTY § 11.1 (1986). There are five principal persons who are inherently involved in a power: (1) the donor, who is the creator of the power; (2) the donee, who is the person who holds the power; (3) the objects, who are the persons for whom an appointment can be exercised; (4) the appointees, who are the persons for whom the powers have been exercised; and, (5) the takers in default, who are the persons who will take the property to the extent that the power is not exercised. *Id.* § 11.2. Persons may function in more than one category. In addition, a power is personal to the donee and may not be exercised by other persons. If a donee does not exercise the power, it expires. Two property interests need identification: (1) the appointive assets which compose the assets subject to the exercise of the power; and, (2) the donee's personal beneficial interest in the appointive assets other than as an object of the power. *Id.* § 11.3.

452. *Id.* § 11.4.

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* § 11.5.

457. *Id.*

458. *Id.*

cannot be exercised until some event or passage of time occurs.⁴⁵⁹ All powers must be in existence before they are exercisable.⁴⁶⁰ A power of appointment created in a living person's will does not come into existence until that person dies and the will becomes effective.⁴⁶¹

Two other characterizations are also relevant.⁴⁶² The donee may hold a purely collateral power if the donee holds no interest in the property except the power.⁴⁶³ On the other hand, the donee may hold a power in gross if the donee holds both an interest in the property and a power that, if exercised, would dispose of the interest that the donee does not hold.⁴⁶⁴

1. *Exercise Of Power Of Appointment*

When a testator holds a testamentary powers of appointment at death, it becomes essential to determine whether the testator, as donee of the power, has exercised it in the will. Most often the instrument that creates the special or general power of appointment specifically names a taker or takers in default of the appointment by the donee. Occasionally, the power does not name takers in default and if a general power is not exercised by the donee, the property reverts to the donor's estate for distribution according to the distribution pattern determined for that estate. The Code includes rules of construction to resolve these issues when a testator's intent is not clearly expressed.

There are several situations that must be distinguished. The following three factors guide the application of the rules of construction adopted in the Code: (1) whether the governing instrument that created the power of appointment expressly requires that a power is exercised by the will only if the donee makes a reference to the power or its source in the will; (2) whether the power of appointment is a general or a nongeneral power; and (3) whether the testator-donee's will expresses an intention to exercise the power of appointment.

a. No Specific Reference Requirement

If the document creating a power of appointment is nonexplicit in that it does not include a requirement that the power may only

459. *Id.*

460. *Id.* § 11.5, cmt. a.

461. *Id.*

462. *Id.* § 11.4, cmt. c.

463. *Id.*

464. *Id.*

be exercised "by a reference, or by an express or specific reference" to the power in the exercising document, a will that contains a "general residuary clause" or that makes a "general disposition of all the testator's property," exercises the power only if one of two conditions are met.⁴⁶⁵ First, a will containing a general residuary clause or a comparable clause exercises a general testamentary nonexplicit power if the document creating the power fails to contain an effective gift in default of exercise.⁴⁶⁶ This rule permits the donee's will to control the disposition of the property subject to the power rather than allowing the takers of the donor's estate to take. A contrary rule can create unintended and unanticipated results, including the need to reopen a donor's closed estate and to cause estate tax consequences to an otherwise settled estate. Second, any general and nongeneral nonexplicit testamentary power is exercised if the testator's will manifests an intention to include the property that is subject to the power as part of the residuary or general disposition clause.⁴⁶⁷

These rules prevent unintended exercises of powers from occurring merely because a residue clause is included in a donee's will but provide a broad exception if admissible evidence indicates that the testator desired to exercise the power. The distinction between interpretations can be illustrated by comparing its application to two typical drafting examples: (1) if the residuary clause in the testator's will merely devises "all the rest, residue and remainder" of the estate, presumably the power is not exercised; but (2) if the residuary clause in the testator's will devises "all the rest, residue and remainder, including any property over which a power of appointment is held," presumably the power is exercised.⁴⁶⁸ The latter is called a "blending" or "blanket" clause.⁴⁶⁹ The inclusion of such a clause in a will raises a presumption under the Code that the testator intended to exercise a power if that power does not require a particular reference to it to be exercised.⁴⁷⁰ When the residuary clause omits the reference to powers of appointment, the presumption is that testator does not intend to exercise a power. Either presumption is subject to rebuttal with extrinsic evidence under the principle of section 2-601.⁴⁷¹

465. U.P.C. § 2-608 (1990) (amended 1993).

466. *Id.*

467. *Id.* § 2-608.

468. *Id.* § 2-608 cmt.

469. *Id.*

470. *Id.*

471. *Id.* § 2-608 cmt.

b. Specific Reference Requirement

If the document creating a power of appointment is explicit in that it includes a requirement that the power may only be exercised “by a reference, an express reference or a specific reference” to the power in the exercising document, the language is presumed to indicate the donor did not desire inadvertent exercise of the power.⁴⁷² This presumption relates to the exercise of all explicit powers whether they are general or nongeneral and to all exercising documents whether they are wills or will substitutes. The exact meaning of this provision is not clear on its face. The comment to the section explains that the section creates a mere presumption against an exercise that prevents, for example, a blending clause from automatically exercising the power as such a clause would do when the power is nonexplicit.⁴⁷³ Beyond the mere presumption, the questions of the donor’s intent as to the requirements for exercise and the donee’s intent as to the exercise of the power are left to extrinsic evidence.⁴⁷⁴ Relevant extrinsic evidence may swing the determination either way: in one direction it may show that the donee intended exercise although the donee did not make an otherwise sufficient reference to the power or, in the other direction, it may show that the donor desired a specific reference to the power and any reference that fails to satisfy this requirement fails to exercise the power. The provision has the apparent purpose of both preventing inadvertent exercise but leaving open the question of proof of intent by inferentially relying on extrinsic evidence to supply that intent.

2. *Virtual Representation And General Powers Of Appointment*

The Code gives special treatment to the acts of, and to formal court orders binding, the sole holder or all co-holders of a presently exercisable general power of appointment.⁴⁷⁵ A general power is described as any power of appointment in which the holder of the power is capable of drawing absolute ownership to the holder personally.⁴⁷⁶ Although a “holder” of such a power is commonly a donee of a general power of appointment created by the donor, the term is also applicable to the settlor or beneficiary of a trust

472. *Id.* § 2-704.

473. *Id.* § 2-704 cmt.

474. *See id.* § 2-701.

475. *Id.* §§ 1-108, 1-403(2)(i).

476. *Id.* § 1-108 cmt.

in which the settlor or beneficiary retains a power to revoke the trust.

A holder or the unanimous co-holders of a presently exercisable general power of appointment can, by granting consent or approval, relieve personal representatives or trustees from a liability or a penalty which these fiduciaries would ordinarily suffer due to a failure to perform a particular duty required by the Code or other law.⁴⁷⁷ Similarly, the holder or unanimous co-holders of a general power may consent "to modification or termination of a trust or to deviation from its terms."⁴⁷⁸ The effect of approval or consent of the holder or unanimous co-holders of a general power is to bind the beneficiaries to the extent that the beneficiaries' interests are subject to the power notwithstanding that no court order is obtained. This virtual representation capability can be of crucial significance in nonjudicial settlements of estates and trusts where consent of all interested parties is essential to effectuate the settlement.

The Code also provides that orders resulting from formal court proceedings which bind a holder or all co-holders of such a general power bind other persons to the extent that these persons' interests are subject to the power.⁴⁷⁹ This provision has the effect of eliminating the ordinary requirements for notice to and jurisdiction over numerous and unknown and sometimes unborn, beneficiaries when litigation occurs.⁴⁸⁰ It would not apply, however, if the validity of the general power itself is the issue involved because the power holder or holders cannot represent the others in this type of litigation.⁴⁸¹ The justification for this ability to bind others is that the holders of presently exercisable general powers of appointment possess the equivalent of full ownership. Furthermore, the financial interests between the holder of the power and those persons who have interests subject to the power are sufficiently compatible to satisfy fairness and due process concerns. The virtual representation power of holders of presently exercisable general powers of appointment does not apply under the Code to holders of nongeneral powers such as special powers and general testamentary powers.

IX. ADDITIONAL SCOPE OF THE CODE

Article II of the Code covers a wide range of subjects not generally covered by statutory law. The meritorious purpose of the Code's provisions is to give definiteness to the law.

477. *Id.* § 1-108.

478. *Id.*

479. *Id.* § 1-403(2)(i).

480. *Id.* § 1-403(2)(iii).

481. *Id.* § 1-403 cmt.

Code provisions cover issues concerning the following matters:

A. Survivorship Duration Determinations

The Code adopts the rule that a beneficiary under any governing instrument must survive the date and time of the relevant event that determines ownership by 120 hours.⁴⁸² This provision applies to a wide range of transfer devices including wills, life insurance policies, multiple-party accounts, transfer on death (TOD) security registrations, and other joint ownership with right of survivorship interests.⁴⁸³ Persons who claim that a beneficiary survived by 120 hours must prove so by clear and convincing evidence.⁴⁸⁴

The 120-hour rule for all gratuitous transfer documents including wills, deeds, trusts, appointments, and other beneficiary designations tracks the same rule that is applicable in the intestate situation.⁴⁸⁵ The difference between these concepts is that in regard to intestacy, the requirement is a rule of law and is not rebuttable whereas the rule applicable to voluntary transfers is alterable by the terms of the document.⁴⁸⁶ The Code is very specific, however, in regards to what is necessary to rebut the statutory rule of construction.⁴⁸⁷ The Code itemizes four general situations where the statutory rule of construction will not apply. First, it will not apply if the governing instrument contains language that deals explicitly with simultaneous death or with deaths in a common disaster and that language is operable under the facts of the case.⁴⁸⁸ Second, the rule of construction is rebutted if the governing instrument expressly indicates that the beneficiary is not required to survive to a particular time or event by any specific length of time or that expressly requires the individual to survive an event or time by a specific period.⁴⁸⁹ The specific period in the above exception includes a reference to the death of another individual. Third, the rule of construction does not apply if application of the rule would cause the transfer to fail to qualify as a valid transfer under the Statutory Rule Against Perpetuities.⁴⁹⁰ The fourth rebuttal for the rule of construction applies in the situation where the rule would result in an unintended failure or unintended

482. *Id.* § 2-702.

483. *See id.* § 1-202(19).

484. *Id.* § 2-702.

485. *See id.* § 2-104.

486. *Id.* § 2-702(d).

487. *Id.*

488. *Id.* § 2-702(d)(1).

489. *Id.* § 2-702(d)(2).

490. *See id.* § 2-702(d)(3).

duplication of a disposition.⁴⁹¹ Notwithstanding the waiver of the 120-hour survivorship requirement, survival of an event or time must be established by clear and convincing evidence.⁴⁹²

Third parties dealing with transferees and bona fide purchasers from transferees, who subsequently fail to survive the necessary period of time, are protected under the Code.⁴⁹³

B. Constructional Rules for Future Interests

The trust device is a common estate planning tool. Inherent in the trust is the future interest. The typical trust is established for the term of one or more persons' lives with the undistributed corpus to be transferred free of the trust to the remainder beneficiaries or to the settlor or the settlor's estate as a reversion. Although life interests, remainder interests, and reversions are present interests, they are called future interests if they are not also presently possessory or currently enjoyed.⁴⁹⁴ Other interests similarly characterized include executory interests, possibilities of reverter, and rights of entry. Any of these interests may have problems of construction at the time the interest becomes possessory or ready for present enjoyment, *i.e.*, identifying the particular beneficiaries who will take. As with most matters of construction, the expressed desires of the transferor will be followed if determinable. Unfortunately, the intent is often not expressed, inadequately expressed, or inapplicable because of changed circumstances. It then is necessary to fill the intent gap with rules of construction. Generally, these rules should conform to the desires of the average transferor. The common law developed rules of construction for these circumstances, but they are often inconsistently applied and produce results that many would contend were not consistent with the desires of the average transferor.

The Code, recognizing the importance of future interest in modern estate planning, addresses the major constructional problems that arise when expressed intent is absent or unclear and distribution decisions must be made.

1. *Survivorship*

The survivorship of the life interests is not a problem. If one is not alive or does not survive the creation of the trust or the

491. *Id.* § 2-702(d)(4).

492. *Id.* § 2-702(d)(2)-(4).

493. *Id.* § 2-702(e)-(f).

494. LAWRENCE W. WAGGONER, *ESTATES IN LAND AND FUTURE INTERESTS IN A NUTSHELL* § 1.2 (1993).

interest in trust, the life beneficiary does not take from the trust. Survivorship is most often a problem of the remainder beneficiaries because their interests do not mature in possession or enjoyment until the death of the holders of the life interests. The question of survivorship arises after the death of the transferor or the date of creation of the trust when the life interest or interests end. Must the remainder beneficiaries survive the time of distribution or merely the time of creation? Courts have had numerous problems with this question.

If the transferor clearly indicates that survivorship to the date of distribution is or is not required, the expressed intent will be obeyed. The problem arises when intent is not clearly expressed. What is the default rule? The general common law rule holds that survivorship to date of distribution is not presumed: that is, if the remainder beneficiary died between the date of creation and date of distribution, the interest passes to the beneficiary's estate for distribution according to the beneficiary's will or by intestacy if there is no will. This construction requires reopening of estates and the consequent complexities. As a result, courts sometimes strain to avoid application of the general rule but have not developed a consistent response to the problem.

The Code adopts a new rule of construction concerning the survivorship requirement for future interests in trust.⁴⁹⁵ It reverses the presumption and provides that there is an implied requirement of survivorship to the date of distribution for future interests held in trust.⁴⁹⁶ In addition, the survivorship requirement is extended to 120 hours after the time of distribution.⁴⁹⁷ For example, under the Code's provision, if a simple trust provides "to T in trust for A for life, remainder to B," B must survive A's death, the date of distribution, by 120 hours in order for B to take the remainder interest.

The new presumption is only applicable to future interests in trust and therefore does not apply to nonequitable interests such as "to A for life, remainder to B."⁴⁹⁸ The common law rule would continue to apply in those cases. Despite the limitation, the new rule will apply to most future interests created today because of the dominance of the trust device as an estate planning tool. One of the arguments for the nonsurvivorship rule is the desire to permit

495. U.P.C. § 2-707 (1990) (amended 1993).

496. *Id.* § 2-707(b).

497. *Id.* § 2-702.

498. *Id.* § 2-707 cmt.

free alienation of property as soon as possible.⁴⁹⁹ If persons who hold remainders do not have to survive anyone to take, the interest is more readily transferrable in comparison with a contingent remainder dependent on survivorship to an unknown date. Survivorship contingencies in regard to trust interests are not barriers to property transfers because the trustee may transfer the property of the trust during its administration.

If beneficiaries fail to survive the date of distribution and the antilapse presumption is unavailable, the Code specifies how the lapse will be treated.⁵⁰⁰ If there is a residual devise in the transferor's will, the trust corpus passes to those beneficiaries.⁵⁰¹ If no residue exists or the residue is in trust and its remainder beneficiaries fail to survive the date of distribution, the trust corpus passes in intestacy.⁵⁰² For future interests created by the exercise of a power of appointment, the lapsed property interest passes to the donor's takers in the default clause, if any, which is treated as creating a future interest in trust.⁵⁰³ If there are still no takers, then the lapsed interest passes as an ordinary future interest, except the transferor means the donor of a nongeneral power and the donee of a general power.⁵⁰⁴

2. *Antilapse*

The presumption that survivorship is necessary may cause interests to fail and if the nonsurviving beneficiary cannot take, might cut off the beneficiary's stock. The problem of forfeiture served in part as the reasoning behind the common law presumption against a survivorship requirement.⁵⁰⁵ Unfortunately, the common law remedy of passing the remainder interest through the nonsurviving beneficiary's estate did not depend upon the existence of descendants surviving the beneficiary. The Code resolves the forfeiture problem by providing an "antilapse" presumption in favor of a nonsurviving beneficiary's descendants.

The Code provides that if a remainder beneficiary fails to survive the date of distribution, a substitute gift arises for the beneficiary's descendants, if any survive.⁵⁰⁶ This is an "antilapse" rule for future

499. *Id.*

500. *Id.* § 2-707(d).

501. *Id.* § 2-707(d)(1).

502. *Id.* § 2-702(d)(2).

503. *Id.* § 2-707(e)(1).

504. *Id.* § 2-707(e)(2).

505. *Id.* § 2-707 cmt.

506. *Id.* § 2-707.

interests in trust.⁵⁰⁷ It protects descendants of all remainder beneficiaries, regardless of their relationship to the transferor. One does not have to be a grandparent or descendant of a grandparent to be entitled to the presumption of the substitute gift. It applies to remainders to specific individuals and to remainders left to classes of persons who are all in a single generation.⁵⁰⁸ Examples of single generation class gifts include gifts to "children," "grandchildren," "siblings," and "nephews and nieces."⁵⁰⁹ It does not apply to multiple-generation class gifts that inherently possess a nonlapsing effect because representation is allowed for descendants of predeceased ancestors in the class.⁵¹⁰ Examples of such class gifts include gifts to "descendants," "issue," "heirs," and "next of kin."⁵¹¹ In a sense, the Code converts all single generation class gifts in remainder to multiple generation gifts in remainder. It applies both to irrevocable inter vivos trusts and to trusts that are created at death.

The antilapse protection is merely a rule of construction subject to revision by the transferor. Similar to the rule as applied to decedent's estates, a mere survivorship requirement in the instrument will not rebut the presumption.⁵¹² The common law rule of lapse and the Code's modification to it are discussed previously.⁵¹³

3. *Worthier Title*

In an effort to clarify an otherwise confused and varied area of the law of future interests, both Arkansas law and the Code abolish the worthier title doctrine.⁵¹⁴ The Code's version is simplified and removes the ancient conveyancing language. It states that transfers which pass interests to the transferor's "heirs," "heirs at law," "next of kin," "relatives," "family," and analogous terms do not create, by law or presumption, a reversionary interest in the transferor.⁵¹⁵ The common law rule is that a remainder is created. Fundamentally, the abolition merely means the transferor's intent must be determined without the assistance of the worthier title

507. See *id.* § 2-603.

508. *Id.* § 2-707(b)(2).

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.* § 2-707(b)(3).

513. *Id.* §§ 2-603, 2-604.

514. ARK. CODE ANN. § 28-9-220 (Michie 1987); U.P.C. § 2-710 (1990) (amended 1993).

515. See U.P.C. § 2-710 (1990) (amended 1993).

presumption or rule. Assumably, when specific intent is not indicated, intent may be established by extrinsic evidence.⁵¹⁶

4. Definition of "Heirs"

The Code provides a rule of construction for terms such as "heirs," "heirs at law," "next of kin," "relatives," "family," or analogous terms used in applicable statutes or any governing instruments.⁵¹⁷ It applies to both present and future interests.⁵¹⁸ The Code simply and properly provides that these terms, when used in relation to a designated individual, pass the interests covered by the transfer to those who would take the designated individual's property according to the intestate succession law of the designated individual's domicile. The date to determine this distribution is the time when the disposition takes effect in possession or enjoyment. If applicable under the law of the domicile, the state may take by escheat if other relations cannot take. One specific exception in the provision bars a surviving spouse of a designated individual from being an heir if the surviving spouse is remarried at the time of distribution.⁵¹⁹

C. Disclaimer of Property Interests

Both Arkansas law and the Code include provisions concerned with the disclaiming of property interests.⁵²⁰ The doctrine of disclaimer continues to be an important post-mortem planning device. Although the basic doctrine is probably universally recognized, unnecessary limitations and uncertainties have developed. The Arkansas and Code provisions seek to correct these deficiencies by codifying the scope and effect of the doctrine as it applies to matters related to probate, succession and all other relevant nontestamentary transfers and contracts.

With a few modifications and some restructuring, the Code is substantially identical in effect to the current Arkansas provisions.⁵²¹

D. Termination of Marital Status

A person's marital status is very important in determining many rights and responsibilities set by the Code. These rights and

516. *Id.* § 2-701.

517. *Id.* § 2-711; *see id.* § 1-201(21).

518. *See* RESTATEMENT (SECOND) OF PROPERTY § 29.4 cmts. c and g (1986).

519. *See* ARK. CODE ANN. §§ 28-1-102 (Michie 1987).

520. *Id.* §§ 28-2-101 to -109; U.P.C. § 2-801 (1990) (amended 1993).

521. AVERILL, *supra* note 5, at 228-33.

responsibilities include, for example, distribution in intestacy, elective share rights, revocation of wills, family protection rights, priority for appointment as personal representative, and appointment of a guardian for an incapacitated person.⁵²² Although the Code leaves the requirements for marriage to the law of domestic relations, it includes provisions setting the scope and effect of legal proceedings and other actions which sever the relationship. This issue is not directly addressed under Arkansas law.

Under the Code, a person is not a surviving spouse of the decedent if the person and the decedent have been divorced or their marriage annulled.⁵²³ This rule does not apply, of course, if they remarry and are married on the date of the decedent's death.⁵²⁴ It also does not apply to a decree of separation that does not terminate the husband-wife status.⁵²⁵ Notwithstanding the absence of a final divorce or annulment, unless a contrary intent appears on the agreement, a complete property settlement entered into after or in anticipation of separation or divorce operates as a disclaimer of the spouse's elective share, family protections, rights under intestate succession, and provisions in wills executed before the property settlement.⁵²⁶

In addition to a spouse who has obtained a valid divorce or an annulment, the term "surviving spouse" also does not include: (1) a person who obtained or consented to a final decree of divorce or annulment even though the decree is not valid in the Code state, unless that person has subsequently remarried the decedent or subsequently lived together as husband and wife;⁵²⁷ (2) a person who participated in a marriage ceremony with a third person following a valid or invalid decree of divorce or annulment;⁵²⁸ or (3) a person who participated as a party to a valid proceeding which terminated all marital property rights.⁵²⁹ The above three situations recognize a kind of estoppel concept. In each one the surviving person has either consented, participated in, sought or completed some volitional act other than the "divorce" that causes the marital relationship to be terminated as far as the surviving spouse's rights under the Code are concerned. Because the rights of a surviving spouse under the

522. See U.P.C. § 2-802(b) (1990) (amended 1993).

523. *Id.* § 2-802(a).

524. *Id.*

525. *Id.*

526. *Id.* § 2-213.

527. *Id.* § 2-802(b)(1).

528. *Id.* § 2-802(b)(2).

529. *Id.* § 2-802(b)(3).

Code are substantial, it is very important that only those who legally and equitably should be considered a surviving spouse are able to take these benefits.

E. Effect of Homicide

Generally, a person's misconduct does not disqualify the person from inheriting property or from taking property passing from other persons.⁵³⁰ Consequently, for example, desertion, conviction of a felony, or adultery will not cause a forfeiture of the wrongdoer's property or rights to property passing from those harmed. There are exceptions. Under the Code, for example, a parent and the kindred of that parent, who fails to support a child while legally obligated to support, may be barred in intestacy from inheriting from the nonmarital child or the child's descendants.⁵³¹

The most pervasive exception to the general rule concerns statutes or court decisions that bar murderers from inheriting or taking property from their victims. The rationale for this rule is to prohibit a wrongdoer from profiting from the wrongful act done to the victim. The substantive and procedural rules for this forfeiture greatly differ among the states which recognize it. In addition, substantial omissions in the rules commonly occur. For example, it is common for a state to bar a murderer from taking in intestacy, testacy, and from receiving life insurance proceeds on the victim's life, but to ignore other forms of property transfers. Sometimes courts have filled in some of the gaps, but many unanswered issues continue to exist.

The only Arkansas statutory provision addressing the right of a murderer to succeed to property deals with dower.⁵³² Arkansas courts, however, have followed common law in denying murderers the right to profit from their wrongs.⁵³³ The lack of a comprehensive statute governing inheritance, testate succession, and nonprobate transfers, as well as the uncertainties of proof requirements, has led to litigation over the issues.⁵³⁴

For the sake of clarity and uniformity, the Code includes a substantively and procedurally comprehensive provision concerning

530. ATKINSON, *supra* note 33, § 31.

531. See U.P.C. § 2-114(c) (1990) (amended 1993).

532. ARK. CODE ANN. § 28-11-204 (Michie 1987).

533. See, e.g., *Sargent v. Benton State Bank*, 279 Ark. 402, 652 S.W.2d 10 (1983).

534. See *Wright v. Wright*, 248 Ark. 105, 449 S.W.2d 952 (1990); *Luecke v. Mercantile Bank*, 286 Ark. 304, 691 S.W.2d 843 (1985).

the effect of homicide on the rights of murderers to take property from, or assume other privileges granted by, their victims.⁵³⁵ Arkansas's statutes ignore the problem except with regard to the inheritance rights of persons who murder their spouse. In general, the Code prohibits a person who feloniously and intentionally kills another from accepting any benefits derived from the victim. The Code deals specifically with statutory benefits conferred as a result of death, benefits conferred in all the decedent's revocable governing instruments, and rights of survivorship in jointly held or community property.⁵³⁶ The Code also includes a catch-all clause providing that the same principles are to be applied to the murderer's acquisition of any property or interest from the victim.⁵³⁷ In addition to forfeiture of property interests, the Code revokes nominations of the murderer in governing instruments to serve in fiduciary or representative capacities such as personal representative, trustee, or agent.

F. Uniform Statutory Rule Against Perpetuities

The common law rule against perpetuities has perplexed students, professors, lawyers, and judges for centuries.⁵³⁸ Although the rule against perpetuities is easy to state, its complexity developed from difficulties in its application. A common formulation of the Rule provides: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."⁵³⁹ The Arkansas Supreme Court follows the common law rule.⁵⁴⁰ The chief purposes of the common law approach are stated to be a desire to curtail the deadhand control of wealth and to facilitate the marketability of property.⁵⁴¹ Few would question its goals, but many have criticized its methods. Several facets of the application of the rule against perpetuities engender the criticisms.

First, the rule against perpetuities is really not a rule concerned with the duration of an interest but is concerned with a technical

535. U.P.C. § 2-803 (1990) (amended 1993).

536. *Id.* § 2-803(b)-(c).

537. *Id.* § 2-803(f).

538. Justice George Rose Smith of the Arkansas Supreme Court commiserated: "The complications that may be presented by the rule against perpetuities are so numerous and difficult that even experienced lawyers and judges must usually consult the authorities to be certain about its application to a given set of facts." *Dickerson v. Union Nat'l Bank*, 268 Ark. 292, 296, 595 S.W.2d 677, 679-80 (1980).

539. JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 201, at 191 (4th ed. 1942).

540. *See, e.g., Cotham v. First Nat'l Bank*, 287 Ark. 167, 697 S.W.2d 101 (1985).

541. ROBERT J. LYNN, *THE MODERN RULE AGAINST PERPETUITIES* 9-10 (1966).

property concept of the vesting of an interest. Comparatively speaking, a relatively short twenty-five year suspended interest could violate the rule against perpetuities for failure to vest within its confines whereas a suspended interest tested against lives in being could be valid under the rule against perpetuities even though it actually will last for ninety years or more. This inconsistency in application justifies criticism.

Second, the rule against perpetuities is enforced with psychic anticipation of contingencies coupled with a draconian "all or nothing" remedy if the contingencies violate the rule against perpetuities. According to common law, an interest created in a governing instrument, whether a will or other transfer device, had to be tested against the rule against perpetuities at its creation. All contingencies in the interest created are tested to see whether they will become vested within the term of the rule against perpetuities. There must be an initial certainty of vesting of all of the interests. If an interest is not certain of vesting within the rule against perpetuities, the concept of infective invalidity might cause the entire transfer to fail. Commentators belabor these points in emphasizing the inconsistency, nonsensical approach, draconian remedy, and unjust result by application of the rule against perpetuities.

The following is but a brief outline of the relevant concepts promoted by the Uniform Statutory Rule Against Perpetuities (USRAP) as well as a brief description of its provisions. The purposes of the USRAP are broad. Obviously, as part of the Uniform Probate Code and as a separate uniform act, it is designed to bring uniformity of the law to the various states in this country. In addition, promulgation of the provisions reaffirms that there is a need for a rule against perpetuities. Abolition of the common law rule against perpetuities was rejected. Another important factor and feature of the provisions is that transfer language in instruments effective prior to enactment of the USRAP continues to be valid after enactment. The USRAP does not enlarge the range of invalidity. It is designed to recognize devices currently valid and to expand the scope of validity to other drafting techniques. Consequently, those who are well versed in the old law will not have to learn new law in order to qualify their transfer techniques.

The core of the USRAP is found in its definition of the period of time within which a non-vested interest must vest in order to be valid. Phrased in the disjunctive, a non-vested interest is valid if it is certain to vest or terminate either no later than twenty-one years after the death of a living individual or within ninety years after

its creation.⁵⁴² The first arm of the rule is merely a codification of the common law rule. The second arm is a form of a wait and see approach tied to a specific length of time. The combination of these two alternate standards can be summarized as follows:

(1) A transfer which is valid under the common law Rule is valid under the USRAP's provision and no modification is necessary to forms or instruments that satisfy this standard;⁵⁴³

(2) Notwithstanding validity under the common law Rule, no interest is contestable as to validity until ninety years have passed from its creation;⁵⁴⁴

(3) The common "savings" clause which specifically terminates an interest within the common law rule will also qualify under this provision.

A primary purpose of USRAP is to reduce, and even eliminate in many situations, much of the litigation concerning perpetuity problems. With some limited exceptions, litigation over perpetuity questions cannot arise until the rule against perpetuities as defined by the statute is violated. Consequently, all transfers which, over time, become effective despite their technical potential invalidity under the old common law rule will not produce litigation. Only a transfer device that violates both period testing arms of the USRAP will come before the court except as noted. Even when litigation does occur, the nature and purpose of the litigation will be dramatically different from much of the litigation under the current common law rule, which derives its motivation from a desire to destroy the contingent interest. Actions are brought by those who will gain by the destruction of the transfer device. Under the USRAP, this type of litigation is eliminated. The only litigation that will arise will be litigation to reform an instrument to conform to the rule. Consequently, only those who wish to settle legitimate concerns and to terminate or to settle ownership of ancient trusts will be able to seek court review. This feature of the USRAP should abolish the common law attribute of granting unjust enrichment to nonintended beneficiaries due to technical failure of transfers because of perpetuity violations.

The USRAP specifically excludes certain transactions and powers from application of its perpetuity rules.⁵⁴⁵ The provision provides

542. U.P.C. § 2-901 (1990) (amended 1993).

543. *Id.* § 2-901(a)(1).

544. *Id.* § 2-901(a)(2).

545. *Id.* § 2-904.

that all exceptions recognized at common law or excluded by statute are excluded under the USRAP.⁵⁴⁶ The USRAP then defines particular situations that also are excluded.⁵⁴⁷ Generally, non-donative transfers are not subject to the Statutory Rule Against Perpetuities.⁵⁴⁸ Although not excepted at common law, the position of the drafters of the USRAP is that this is the preferred law because a perpetuity rule that concerns gratuitous transfers is not appropriate to apply to transactions with consideration.⁵⁴⁹ Arkansas cases applying the rule against perpetuities to repurchase options contained in a deed and to independent options to purchase would be overruled.⁵⁵⁰

The purpose of these exclusions is to draw particular divisions between the types of transfers to which the Rule should apply versus those to which it should not. The USRAP does not indicate that other durational limitations should not be imposed on the excepted transfers. The point being that the rule against perpetuities is the wrong policy to apply against these devices and that particular specialized durational limitations need to be developed for them.

G. Honorary Trusts

The honorary trust is loosely definable as an "intended trust for a specific non-charitable purpose" where no beneficiary is actually named and the designated purpose cannot be considered charitable.⁵⁵¹ The legality of these devices has been far from secure. The Code

546. *Id.* § 2-904(7).

547. *Id.* § 2-904(1-6).

548. *Id.* § 2-904(1). The USRAP codifies the common law determination that nonvested charitable interests held in trust or by governmental entities are not subject to the perpetuity period so long as they pass from one charitable entity to another charitable entity. *Id.* § 2-904(5). Furthermore, with some particular exceptions, nonvested property interests or powers of attorney in regard to trusts or other arrangements dealing with pension, profit sharing, stock bonuses, and other types of employee benefit arrangements are excepted from the Rule as well. *Id.* § 2-904(6). Purely administrative or management powers that are not related to distribution are excepted from the Rule because they exist in trust instruments. *Id.* § 2-904(2). In addition, a power to appoint a fiduciary, and a discretionary trustee's power to distribute principal to an indefeasibly vested beneficiary are excepted. *Id.* § 2-904(3)-(4).

So that the exclusion is not interpreted beyond its intent, however, the USRAP excepts from the exclusion certain transactions that are in the nature of donative transfers despite their nongratuitous characterization. This would include prenuptial and postnuptial agreements, separation or divorce settlements, surviving spouse elections, and other similar types of devices specifically enumerated.

549. *Id.* § 2-904 cmt.

550. *See* *Otter Creek Dev. Co. v. Friesenhahn*, 295 Ark. 318, 748 S.W.2d 344 (1988); *Broach v. City of Hampton*, 283 Ark. 496, 677 S.W.2d 851 (1984).

551. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (1959).

in its optional section both legitimatizes and limits the duration of such honorary trusts.⁵⁵²

Under the Code, any transfer in trust that is for a lawful non-charitable purpose, either as specified in the instrument or as selected by the trustee, may be performed by the trustee regardless of whether there is a beneficiary who can enforce or terminate the trust.⁵⁵³ The duration is set at twenty-one years and applies even if the instrument contemplates a longer period.

The main importance of this section, if enacted by a state, is that it permits a trustee to enforce these types of devices only for a period of twenty-one years. The Code gives no guidance as to what a non-charitable purpose is. Assumably it would include, for example, trusts for the offering of masses and for the care of personal individual grave sites.

Another provision included in the Code concerns a similar type of transfer, *i.e.*, the trust for pets.⁵⁵⁴ Pet owners commonly desire that their pets be well cared for after their deaths. Transfers to and trusts for the benefit of pets have sometimes been approved as honorary trusts.⁵⁵⁵ The Code gives both recognition and definition to these desires. It specifically permits assets to be transferred in trust for the care of designated domestic or pet animals.⁵⁵⁶ Although validity is guaranteed under the provision, it limits the duration of the trust to the lives of the covered animals living when the trust is created.⁵⁵⁷ Instruments are to be liberally construed and extrinsic evidence freely admitted to determine the transferor's intent.⁵⁵⁸

Several administration provisions are included to regulate the above transfer devices. Income and principal of the trust must be used only for trust purposes or for covered animals unless the instrument expressly provides otherwise.⁵⁵⁹ On termination, the trust must be transferred according to its creation instrument or the relevant clauses of the transferor's will or by intestacy.⁵⁶⁰ The Code makes the intent enforceable by the trustee or other court appointed persons.⁵⁶¹ A court may name a trustee, if none is designated or

552. U.P.C. § 2-907(a) (1990) (amended 1993).

553. *Id.*

554. *Id.* § 2-907(b).

555. See RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. d (1959).

556. U.P.C. § 2-907(b) (1990) (amended 1993).

557. *Id.*

558. *Id.*

559. *Id.* § 2-907(c)(1).

560. *Id.* § 2-907(c)(2); see *id.* § 2-711.

561. *Id.* § 2-907(c)(4).

no one is willing to serve, and order transfer to another trustee in order to see the intended use carried out.⁵⁶² A court may adjust the funds and order the excess distributed as it would be if the trust ended.⁵⁶³

Because no reported Arkansas cases deal with honorary trusts, the adoption of the Code would clarify the availability of them for Arkansas's testators.

X. CONCLUSION

All interested persons 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 is to provide a general comparison of Article II of the Code with existing Arkansas law. The central thesis, supported by that comparison, is that the Code will substantially improve Arkansas's substantive law of intestate succession, family protection, wills, and other donative transfers. We should, therefore, all support its adoption.

Despite what some might consider to be imperfections in the Code, it is clearly the best legislative model both comprehensively and individually. The Arkansas legislature needs to overcome provincialism and recognize the changes that have occurred in regard to property ownership and transfer. The Code offers so much more than current law. The Code is clearly a dynamic instrument of reform deserving of wide support. Not only has property ownership changed from an emphasis on real property to personal property, but even the type of personal property has changed. We live in a mobile, diverse society with a wide range of familiar relationships. People believe that property transfers are private transactions not requiring continual court or government regulation supervision or intervention. Probate law needs to recognize these factors. The Code provides that direction.

562. *Id.* § 2-907(c)(7).

563. *Id.* § 2-907(c)(6).