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Hary A. Fenn

Edward F. Koren

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THE 1974 FLORIDA PROBATE CODE — A MARRIAGE OF CONVENIENCE*

HENRY A. FENN** and EDWARD F. KOREN***

PART I — INTESTATE SUCCESSION AND WILLS

Every thirty to forty years sufficient pressure develops for modernization, or to use the more popular appellation — reform — to accomplish a major revision of a state's probate laws.[1] Such periodic pressure is not surprising because these laws affect the property rights of a citizen a minimum of three times in his life — on the death of each of his parents and again on his own death. On a national scale, evidence of a new ground swell of public concern was demonstrated by the spectacular success in 1966 of a book entitled *How To Avoid Probate.*[2] Other publications carried the same message, or at least a critical appraisal of existing probate laws.[3] Statistical studies showed that the public was listening to the criticism and taking the advice; in California, more than sixty per cent of all estates valued between $10,000 to $400,000 were passing *outside* the probate procedures.[4]

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**B.A., 1932, LL.B., 1935, Yale University; Dean Emeritus and Professor of Law, University of Florida.

***B.S.B.A. 1971, J.D. 1974, University of Florida; Instructor of Law, University of Florida.

1. Two examples of the periodic nature of the modernization of a state's probate laws are found in New York and Pennsylvania. From 1961 to 1965, New York enacted the first major reform of its probate laws since the 1928 revisions instituted by the celebrated Foley Commission. Durant, *An Introduction to the Uniform Probate Code,* in 1 P-H WILLS, ESTATE & TRUSTS ¶71, at 72 & n.2. This same interval is found in Pennsylvania's 1947 revision of its probate provisions — the first since 1917. 20 PA. STAT. ANN. at v (Purdon 1950). Showing that there is always an exception to any generalization, the state enacted a new Probate, Estates and Fiduciaries Code in 1972 — just 25 years after the 1947 revision. Pa. Act 1972, No. 164.

2. N. DACEY, HOW TO AVOID PROBATE (1965). The chief reporter of the Uniform Probate Code, Richard Wellman, recognized the impact of Dacey's book, observing that initial sales had exceeded 670,000 and the book headed the nonfiction best seller lists for several months in 1966. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance,* 44 IND. L.J. 191, 192 (1969).

3. *E.g.,* M. BLOOM, THE TROUBLE WITH LAWYERS (1968); Bloom, *Time To Clean Up Our Probate Courts,* READER'S DIGEST, Jan. 1970, at 112; Bloom, *The Mess in Our Probate Courts,* READER'S DIGEST, Oct. 1966, at 102; Morgan, *The Probate Fuss,* LOOK, Nov. 29, 1966, at 36; Taylor, *You Can Avoid the Probate Trap,* READER'S DIGEST, June 1970, at 93.

4. MacKay, Johnson, Birchfield & Redman, *A Middle Ground for Reform,* 47 FLA. B.J. 439 (1973) [hereinafter cited as MacKay], *citing* 1964 CAL. ST. INHERITANCE TAX REP. APPROVED 42-43, table 22.

Presaging this latest pressure, the American Bar Association instituted a program for probate reform in 1962.[5] A year later, the National Conference of Commissioners on Uniform State Laws assumed major responsibility for the project, and in 1969 the joint efforts of these organizations culminated in the promulgation of the Uniform Probate Code (UPC).[6]

In Florida, a periodic modernization was due by 1973, for the last major revision of the state's probate laws had occurred in 1933.[7] Undoubtedly spurred by the promulgation of the UPC, there was a rapid transition from ineffective demands for reform by the public and from within the bar to affirmative legislative action. The history of this action, which culminated in unanimous enactment of the 1974 Florida Probate Code (1974 Code),[8] is succinctly stated by the chairman of the Florida Bar committee appointed to study the UPC:

> The Real Property, Probate, and Trust Law Section of The Florida Bar, in 1969, considered the Uniform Probate Code while still in draft form, and appointed me as chairman of the Uniform Probate Code Committee. . . . The committee acknowledged that while some sections of the UPC were controversial and produced mixed feelings within the committee, we approved in principle the UPC. Our study coincided with the efforts of several legislators to enact the UPC in Florida. The UPC was introduced as House Bill 997, in the 1973 Florida Legislature. The Board of Governors of The Florida Bar asked the leaders of the House and Senate not to pass any probate reform legislation at that session, but rather to establish a study commission to consider the Uniform Probate Code and probate reform generally and report to the Legislature prior to the 1974 Regular Session. The result was the creation of the 14-member Legislative Probate Code Study Commission [Laws of Florida, ch. 73-307]. The new Florida Probate Code was prepared by the Legislative Probate Study Commission and is organized, and generally structured along the lines of the UPC, with much of our existing probate and guardianship law retained but repositioned.[9]

This article examines the first five chapters enacted by chapter 74-106, which are to be known collectively as the Florida Probate Code.[10] These pro-

5. *Uniform Probate Code Approved by Council,* 4 REAL PROPERTY PROBATE & TRUST J. 206, 207 (1969).

6. The Commissioners adopted the new Code in August 1969. NATIONAL CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UPC]. That same month, the ABA House of Delegates gave its approval to the UPC. *Association's House of Delegates Meets in Dallas,* 55 A.B.A.J. 970, 976 (1969).

7. Fla. Laws 1933, ch. 16,103. This was a complete revision of all the substantive and procedural laws pertaining to wills. 1 D. REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA §105, at 21 (4th ed. 1971). In 1941, the 1933 Act became part of the Florida Statutes enacted that year. *Id.*

8. Fla. Laws 1974, ch. 74-106, *to be codified as* FLA. STAT. §§731.01 *et seq.* The short title will be the Florida Probate Code [hereinafter cited as FPC]. FPC §731.01 (1974).

9. Stewart, *The Florida Probate Reform Act,* 48 FLA. B.J. 546 (1974).

10. FPC §731.01 (1974). Chapter 737, Trust Administration, and chapter 744, Guardianship, are not within the scope of the article, although they were enacted at the same time. Fla. Laws 1974, ch. 74-106. Although there are numerous technical and grammatical errors in chapter 74-106, they are generally not noted in this article. Usually the meaning of the

visions deal with the substantive laws of wills, intestate succession, and the administration of decedents' estates. Of the 185 sections of chapters 731 through 735, nineteen may be classified as totally new, sixty-one as derived from the UPC—some with substantial changes, thirty-two as stemming from present law but with substantive changes, and the remaining seventy-three sections as continuations of present law with only editorial changes. Comparisons are made to both current law and the recommendations of the UPC, especially regarding the important changes in Florida law. While many of the unchanged provisions are not analyzed, two appendices are included for the convenience of the reader, listing the reposition of sections of the current law in the 1974 Code, the source from which each section of the 1974 Code seems to be derived, and where reference is made to it in this article. Finally, certain amendments to the new law are recommended, which the authors believe will help clarify some of the changes or more fully realize desirable objectives.

THE UPC'S APPROACH TO REFORM

Beginning in 1942, research directed toward probate reform was undertaken in connection with the Model Probate Code.[11] An examination of the results shows that the existing state statutes were permeated with evidence of legislative paternalism and parochialism.[12] The paternalism is illustrated by the close court supervision required for the administration of estates, exemplified by numerous procedural devices designed to protect the beneficiaries and creditors of an estate. The parochialism is evidenced first by the limitation of the personal representative's authority to the state of his appointment, thus requiring administration in each state where assets are found. A second aspect of parochialism is the lack of uniformity in the laws of the various states, which frequently results in major disruptions of estate plans when a testator moves from one state to another.

Recent empirical studies support the conclusion of paternalism.[13] The most recent of these was conducted in Cleveland in 1965-1966 and showed that the substantive laws of wealth transmission did not reflect the desires of the average decedent.[14] Moreover, it also demonstrated that in the majority of

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statute is clear despite the errors, and, in any event, the Probate Commission has prepared a list of these errors for correction by the 1975 legislature.

11. Simes & Basye, *The Organization of the Probate Court in America,* 42 MICH. L. REV. 965, 43 MICH. L. REV. 113 (1944); Simes & Basye, *The Function of Will Contests,* 44 MICH. L. REV. 503 (1946). The same articles appear in L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 385, 682 (1946).

12. L. SIMES & P. BASYE, *supra* note 11, at 241-375 (app. A) (containing a statistical compilation of the then existing state statutes); *Monographs on Problems in Probate Law, id.* (pt. 3), at 383-756. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS (1953).

13. *See* M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE (1970) (study of Cleveland, Ohio); Dunham, *The Method, Process and Frequency of Wealth Transmission at Death,* 30 U. CHI. L. REV. 241 (1963) (study of Chicago, Illinois). Although not referring to these studies, the chief reporter of the UPC reached the same conclusion. Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's,* 2 CONN. L. REV. 453, 455 (1970).

14. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 298-99.

instances the protections accorded to beneficiaries and creditors are unneeded.[15] Thus, as four Florida legislators concluded:

> The Cleveland experience also tells us that probate procedures have little real meaning for creditors of decedents, that claims are rarely, if ever, made on bonds, that most beneficiaries do not contest wills or present competing claims and that the likelihood of inheritance by minors is more remote than normally anticipated.[16]

In other words, the cost of the procedures in many instances outweighs the protections accorded. Therein lies the basis for the many criticisms that have been levied against the probate system in recent years and for the increasing use of devices for avoiding probate.[17]

The draftsmen of the UPC responded to this criticism with recommendations for both substantive and procedural reform. Although much of the commentary on the UPC has focused on its procedural aspects,[18] perhaps just as important in terms of the law reflecting the desires of the average citizen are the recommended changes in the substantive law of succession. Both the procedural and substantive provisions reflect what may be characterized as the UPC's six major objectives. These are:

> (1) to modernize the rules of intestate succession and thereby "provide suitable rules . . . for the person of modest means who relies on the estate plan provided by law";[19]
>
> (2) to provide an elective share system "designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a 'fair share' of the decedent's estate";[20]
>
> (3) to simplify the requirements of will execution in order to restore the will "to its role as the major instrument for disposition of wealth at death";[21]
>
> (4) to decrease the amount of court supervision required for the administration of estates by providing "persons interested in decedent's estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances";[22]
>
> (5) to increase uniformity of the probate law throughout the country and thereby "reduce the problems of planning via wills for persons who own property in several states";[23] and
>
> (6) to reduce the need for multiple administration of estates by per-

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15. *Id.* at 298.

16. MacKay, *supra* note 4, at 439.

17. Wellman, *supra* note 13, at 454; Wellman, *supra* note 2, at 191-94. See notes 2-3 *supra* and accompanying text.

18. *See, e.g.*, Stroup, *Probate Practice Under the Uniform Probate Code*, 46 N.D.L. REV. 289 (1970); Wellman, *supra* note 2; Wellman, *supra* note 13; Note, *The Uniform Probate Code — A Refreshing Approach to Probate Reform*, 46 N.D.L. REV. 327 (1970).

19. UPC, art. 2, pt. 1, General Comment.

20. UPC, art. 2, pt. 2, General Comment.

21. UPC, art. 2, pt. 5, General Comment.

22. UPC, art. 3, General Comment.

23. Wellman, *supra* note 2, at 201.

mitting "unified administration of decedent's estates located in several states under the law of the decedent's domicile."[24]

While these are seemingly idealistic goals, it should be noted that the draftsmen who devised them were, for the most part, practitioners who had experienced the inadequacies of the existing laws.[25] Their experiences were bolstered by the empirical data of the will studies that also revealed many problems.[26]

An example of how these studies were the foundation for many of the UPC provisions is seen in its "statutory estate plan."[27] It is a general belief that the intestacy laws should provide for distribution of property in a manner most similar to that which an intestate would have provided had he left a properly executed will.[28] The will studies showed, however, that the typical laws of intestacy failed to satisfy this goal.[29] These studies first established the characteristics of the average intestate,[30] and then examined the wills of decedents with similar characteristics. By inference, the probable intentions of the average intestate were thus established.[31] Armed with these data, the drafters of the UPC were able to devise a plan of intestate succession that more closely approximated these intentions. In so doing, they "reject[ed] the feature of existing law which tends to compel every married person to make a will or employ a will substitute."[32]

Most of the other objectives also responded to shortcomings of the existing laws that were exposed both by the will studies and the draftsmen's experience in practice. Although in at least one instance the recommendation seems to be more a "solution in search of a problem,"[33] as a whole, the UPC is a well designed method of modernizing the nation's probate laws and procedures that "should tend to reduce pressures on persons of modest means

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24. Wellman, *How the Uniform Probate Code Deals with Estates that Cross State Lines,* 5 REAL PROPERTY, PROBATE & TRUST J. 159 (1970).

25. UNIFORM PROBATE CODE, OFFICIAL TEXT xxiii-xxv (West 1970).

26. See notes 13-16 *supra* and accompanying text.

27. Wellman, *Selected Aspects of Uniform Probate Code,* 3 REAL PROPERTY, PROBATE & TRUST J. 199, 204 (1968).

28. *See* Dunham, *supra* note 13, at 241 & n.1.

29. Dunham, *supra* note 13, at 258-63; *see* M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 293-99.

30. The average intestate was found to be younger, M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 65; Dunham, *supra* note 13, at 279; less wealthy, M. SUSSMAN, J. CATES & D. SMITH, *supra* at 73; Dunham, *supra* at 264; more likely to be single, M. SUSSMAN, J. CATES & D. SMITH, *supra* at 70; and of a lower social or occupational status than a testate decedent, M. SUSSMAN, J. CATES & D. SMITH, *supra* at 76-77; Dunham, *supra* at 248.

31. O'Connell & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code,* 14 ARIZ. L. REV. 205, 209 (1972); Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio,* 34 OHIO ST. L.J. 114, 116 (1973).

32. Wellman, *supra* note 2, at 200.

33. Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem,* 33 U. CHI. L. REV. 681 (1966). Although the author was referring to dower laws in general, the UPC's elective share provisions seem to merit the same characterization. See text accompanying notes 246-272 *infra.*

to make wills *or* avoid probate."[34] As the individual provisions of the 1974 Code are examined, their success in attaining this goal, as well as the six major objectives of the UPC, will be considered.

INTESTATE SUCCESSION

The new provisions governing intestate succession are to a large degree based upon the "statutory estate plan"[35] of the UPC. This plan was promulgated "to reflect the normal desire of the owner of wealth as to disposition of his property at death,"[36] and thereby "provide suitable rules . . . for the person of modest means who relies on the estate plan provided by law."[37] To this end, it is designed to reflect four somewhat competing considerations: (1) the results of recent empirical studies showing the average married person wants most, if not all, of his property to pass to the surviving spouse;[38] (2) the desire of many legislatures to protect children from possible disinheritance by the spouse;[39] (3) the desirability in larger estates of reducing estate taxes by maximizing the marital deduction;[40] and (4) the wish to avoid in smaller

34. Wellman, *supra* note 2, at 200 (emphasis in original).

35. Wellman, *supra* note 27, at 204.

36. UPC, art. 2, pt. 1, General Comment.

37. *Id.* As noted earlier, the draftsmen of the Uniform Probate Code were heavily influenced in their development of the statutory estate plan by the results of the Cleveland and Chicago will studies, which showed that the typical intestacy laws did not "reflect the normal desire" of the average citizen concerning the disposition of his property at death. See text accompanying notes 27-32 *supra*. For example, most married testators left most, if not all, of their property to the surviving spouse instead of treating the survivor as one of the children. See note 4 and accompanying text *supra*.

38. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 289-91; Durham, *supra* note 13, at 253. For a fuller discussion of these studies, see text accompanying notes 27-32 *supra*. *See* Mulder, *Intestate Succession Under the Uniform Probate Code*, 3 PROSPECTUS 301, 312 (1970); O'Connell & Effland, *supra* note 31, at 210.

39. Mulder, *supra* note 38, at 313-15. The author believes that such a "blanket attitude of distrust" is inappropriate, and that the entire estate should pass to the surviving spouse, with the probate judge vested with the power to require the spouse to "post bond or, if necessary, give the children an immediate share in the estate." *Id.* at 315. This, however, poses several problems in taxation. First, as the author recognizes, it will result in double taxation of the estate ultimately passing to the children. *Id.* at 316-17; see note 40 *infra*. In addition, it is possible that the judge's power to divest the spouse of a part of the estate would make that portion a "terminable interest" and thereby disqualify it from the marital deduction. INT. REV. CODE OF 1954, §2056(b). *But see* TREAS. REG. §§20.2056(b)-1(g), ex. 8.

40. INT. REV. CODE OF 1954, §2056. The marital deduction allows the decedent's taxable estate to be reduced by the value of the interest passing to the surviving spouse, up to a maximum deduction of 50% of the adjusted gross estate. INT. REV. CODE OF 1954, §2056. This maximum would never be realized under current Florida law if the intestate left more than one child. The spouse would either share equally with the children or claim a one-third dower interest in the estate. In either event, a portion of the allowable deduction would be lost.

On the other hand, if the statute followed the will studies, see text accompanying notes 27-32 *supra*, passing most or all of the estate to the surviving spouse, part of the children's ultimate shares would be subject to double taxation. First, the half not allowed as a marital deduction would be taxed in the intestate's estate and then the entire estate would be taxed again on the death of the survivor. By providing that the survivor receives just over one-half

estates the expense and restrictions of guardianship for minors.[41]

In some instances, however, existing Florida law has been retained, even when in conflict with the UPC. This reflects an effort to minimize changes unsupported by persuasive data. For instance, the system of inheriting per stirpes remains,[42] although the UPC recommends per capita distribution with representation;[43] and the half-blood heir continues to receive only a half share unless all heirs are of the half-blood.[44]

The Surviving Spouse and Lineal Descendants

The major operative sections relating to intestacy represent a decided change in Florida law, especially with regard to the surviving spouse and children.[45] The share of the surviving spouse depends upon whether a lineal descendant of the decedent also survives, and, if so, whether all of the lineal

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of the estate, see text accompanying notes 45-55 *infra*, this double taxation is reduced. For example, if an intestate had a taxable estate of $200,000 (before the marital deduction), and $100,000 passed to the surviving spouse, each estate would have a tax liability of $20,700, or a total of $41,400. On the other hand, if the entire estate passed to the survivor, there would still be a tax of $20,700 on the intestate's estate; however, assuming no other changes, the total tax liability would be substantially increased. The survivor's taxable estate now would be $179,300 ($200,000 less the $20,700 tax paid), which would result in a tax liability of $44,490. Aggregating these two amounts, the total liability for both estates would be $65,190—an increase of $23,790.

41. Mulder, *supra* note 38, at 314. See note 55 and accompanying text *infra*.

42. *Compare* FPC §732.104 (1970), *with* FLA. STAT. §731.25 (1973).

43. UPC §2-106.

44. *Compare* FPC §732.105 (1974), *with* FLA. STAT. §731.24 (1973). Section 2-107 of the UPC provides for equal shares in all events, eliminating the discrimination against half-bloods as a "vestige of another era," when the rule was promulgated for evidentiary purposes. O'Connell & Effland, *supra* note 31, at 223. As these authors observe:

"Since the distinction between whole- and half-bloods is not needed as an evidentiary tool, there would appear to be no rational basis for its continuation. It is anomalous to confine a relative of the half-blood to a half-share but to give a relative who is adopted and has no blood relationship at all a full share [see text accompanying notes 70-86 *infra*]." *Id.*

The section on escheat also remains largely the same, although the new section eliminates procedural provisions and provides that the amount to which a subsequent bona fide claimant is entitled shall be repaid *with* interest. FPC §732.107 (1974). It also shortens the time for filing claims from 20 years to 10 years. *Compare* FPC §732.107(4) (1974), *with* FLA. STAT. §731.33(4) (1973).

45. The first step in the new method of succession simply provides that "any part of the estate of a decedent not effectively disposed of by will passes to the heirs . . . [by intestacy]." FPC §732.101 (1974). FPC §731.201(9) defines "estate" as "property of a decedent that is the subject of administration." Although a statutory definition of "intestate estate" is new to Florida law, it is merely a codification of existing case law. *E.g., In re* Stephan's Estate, 142 Fla. 88, 194 So. 343 (1940); Sorrels v. McNally, 89 Fla. 457, 105 So. 106 (1925); Crolly v. Clark, 20 Fla. 849 (1884).

Like Florida law since 1933, no distinction has been made between real and personal property in the intestate estate; but instead of continuing the interchangeable use of certain terms, such as devise and bequest, the 1974 Code simply defines "devise" as referring to both real and personal property and therefore including the use of the word "bequest." FPC §731.201(6) (1974). In a similar fashion, several other historical terminologies have been eliminated from the new statute.

descendants are also lineal descendants of that spouse.[46] If there is no surviving lineal descendant, there is no change in the existing law — the spouse takes the entire intestate estate.[47] If lineal descendants do survive, however, the 1974 Code assures the spouse of considerably more than merely "taking . . . as if he or she were one of the children."[48] Thus, if all of the lineal descendants are the descendants of the survivor's marriage to the decedent, the surviving spouse takes the first $20,000 plus one-half of the balance of the estate;[49] the remaining one-half is divided among their lineal descendants per stirpes.[50] When one or more of the surviving lineal descendants is not a lineal descendant of the spouse, as in the case of a second marriage,[51] the spouse still takes one-half of the estate although the initial $20,000 share is eliminated. Again, the remaining half is divided per stirpes[52] among *all* lineal descendants.

Judging from the will studies, this statutory plan more closely approximates the intentions of the average owner of a small estate than does existing law.[53] In larger estates, the plan guarantees the maximum use of the marital deduction with the minimum of double taxation of the children's ultimate

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46. FPC §732.102 (1974). The UPC added a third contingency — whether the decedent was survived by parents, if there were no surviving lineal descendants. UPC §2-102(2). This provision was apparently designed to return a portion of the estate to the parents in situations where they were the major contributors to the estate of a recently married decedent, or, in cases of marriages of longer duration, to allow the decedent's own blood line to retain part of the estate. Mulder, *supra* note 38, at 313.

47. *Compare* FPC §732.102(1)(a) (1974), *with* FLA. STAT. §731.23(2) (1973).

48. FLA. STAT. §731.23(1) (1973). The new statute gives the surviving spouse at least one-half of the estate, see text accompanying notes 49-52 *infra*, which will be an increase in all cases where there is more than one surviving lineal descendant.

49. FPC §732.102(1)(b) (1974). The UPC suggested that the initial share be $50,000, UPC §2-102; a figure apparently derived from the fact that the majority of wills in the Chicago study, which devised the entire estate to the surviving spouse, involved estates of $50,000 or less. *See* Dunham, *supra* note 13, at 250; *cf.* M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 173.

50. FPC §732.103 provides, *inter alia*, "[t]he part of the intestate estate not passing to the surviving spouse under §732.102 F.S. . . . descends as follows:

"(1) to the lineal descendants of the decedent . . . ." Of course, if there is no surviving spouse, then the entire amount passes to the lineal descendants as under existing law. *Compare* FPC §§732.102-.103, *with* FLA. STAT. §732.23(3) (1973). In either event, FPC §732.104 provides that this inheritance shall be per stirpes.

51. An illegitimate child of the decedent could also present this situation. See text accompanying notes 87-94 *infra*.

52. FPC §732.102(1)(c) (1974). See note 50 *supra*.

53. See text accompanyng notes 27-32 *supra*. Based on these same studies, however, it has been argued that the provisions do not go far enough; that the spouse should receive the entire property when all of the surviving heirs are lineals of the marriage. See note 39 *supra*. While most of the wills examined did indeed provide such a disposition, it should be remembered that they disposed of relatively small estates, generally less than $50,000. Dunham, *supra* note 13, at 260. *Cf.* M. SUSSMAN, J. CATES & D. SMITH, *supra* note 13, at 173. Even with the legislature's reduction of the spouse's initial share from $50,000 to $20,000, see note 49 *supra* and accompanying text, the Florida plan allows the decedent to leave a fairly substantial estate before this initial share is exhausted. Also, in the not unusual situation of a decedent leaving little else but a home and substantial insurance payable to the surviving spouse, the spouse *will* receive the entire estate. See note 55 and accompanying text *infra*.

shares.[54] The need for guardianships will be reduced also, for with the 1974 Code's increased amount of exempt property and larger family allowance, there could well be a net estate of approximately $32,000 before lineal descendants begin to share.[55] In view of these advantages and the obvious alternative of a will if the decedent is not satisfied with the statutory plan, the new provisions seem to be a decided improvement in Florida law.

The Parents and Collateral Heirs

The provisions governing the intestate shares of the decedent's other natural heirs are merely edited versions of our existing statutes.[56] Parents share only if no spouse or lineal descendant survives.[57] If no parent survives, the estate passes to the brothers and sisters of the decedent and the descendants of deceased brothers and sisters;[58] if none of these survives the decedent, the estate is divided into moieties that descend to the paternal and maternal grandparents or their descendants.[59] At this point, rather than continuing the search for takers to great grandparents and their descendants, as in the present statute, the new law passes the estate immediately to the kindred of the last deceased spouse of the intestate.[60] In the unlikely event that neither

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54. See note 40 *supra.*

55. Section 732.401 of the 1974 Code continues the provision for a homestead exemption mandated by article X, §4 of the Florida constitution. See text accompanying notes 224-227 *infra.* In addition, the provisions for exempt property and a family allowance have been increased to allow the spouse to take up to $5,000 of household furnishings, $1,000 of personal effects, and $6,000 as a family allowance. *Compare* FPC §§732.402-.403 (1974), *with* FLA. STAT. §§731.36, 733.20(d) (1973), and see text accompanying notes 227-230 *infra.* Thus, the surviving spouse may take $6,000 of exempt property under FPC §732.402, a $6,000 family allowance under FPC §732.403, and the first $20,000 of the remaining estate under FPC §732.102(1)(b). Therefore, the intestate could leave an estate of $32,000 before the lineal descendants begin to share and if homestead of life insurance payable to the spouse is considered, the initial share could be quite large. It should be noted, however, that these new provisions increasing the exempt property and family allowance may be constitutionally invalid. See text accompanying notes 227-230, 235 *infra.*

56. The provisions governing the order of succession of collaterals also coincide with those recommended by the UPC. *Compare* FPC §732.103 (1974), *with* FLA. STAT. §731.23 (1973) *and* UPC §2-103.

57. If both parents survive, they share equally in the estate, otherwise the survivor succeeds to the entire estate. FPC §732.103(2) (1974). As noted earlier, under the UPC the parents would also share in the estate if the decedent left a spouse, but no lineal descendants. See note 46 *supra.*

58. FPC §732.103(3) (1974).

59. FPC §732.103(4) (1974). A statutory anomaly becomes apparent at this point where the legislature has tried to prevent the escheat of half of the estate where there was no kindred of one side. Although expressed differently, both §§(4)(c) and (5) of FPC §732.103 provide that the entire estate descends to the other side in this situation. This redundancy should be corrected by deleting the first sentence of §5 and amending the second to read simply: "If none of the foregoing . . . ." While there is no difference in the meaning of the two provisions, this change is suggested to maintain consistency and to avoid the insertion of outdated language in the statute.

60. *Compare* FPC §732.103(5) (1974), *with* FLA. STAT. §§731.23(6)(c), (d) (1973). This provision is similar to the last sentence of §732.23(7) and is a worthy addition to the UPC

the decedent nor his last deceased wife left kindred within the required degree, the estate escheats.[61]

The elimination from the inheritance scheme of relatives more remote than descendants of first cousins — the so-called "laughing heirs" — follows the UPC and seems desirable.[62] Similar proposals have been made in the past,[63] but historical precedent and distaste for escheat have impeded their adoption. The latter objection is somewhat obviated by passing the estate to the kindred of the last deceased spouse, thus reducing the escheat possibility. The historical objective of "keeping the property in the family" has diminished in importance with the increased mobility of our society and the corresponding reduction in close relationships among remote relatives.[64] Indeed, it is likely that the decedent had closer contacts with his deceased wife's nearer relatives than with his own remote kindred. Because these provisions also lessen the likelihood of expensive and time-consuming searches for remote heirs and reduce the number of possible contestants of a will — important advantages to both the decedent and his intended beneficiaries[65] — they are a laudable modernization of the law of inheritance by collaterals.[66]

Status of Special Heirs

In any complete succession plan, there must be provisions for less usual familial relationships — the half-blood, the illegitimate, the adopted child, the

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proposal. *See* UPC §2-103. In order to avoid problems arising when the decedent's "last deceased spouse" has left a will, this provision should be amended to read: "[A]s if the deceased spouse has survived the intestate and then died *intestate* entitled to the estate." In this manner it would pass without question to the spouse's intestate successors rather than to the testamentary beneficiaries.

61. FPC §732.107 (1974). See note 44 *supra*.

62. *See* UPC §2-103, Comment. That this was the desire of most decedents is supported by the Chicago will study. Dunham, *supra* note 13, at 255, 263.

63. *See* Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203, 208-09 (1935).

64. Curry, *supra* note 31, at 120-21; Mulder, *supra* note 38, at 230.

65. O'Connell & Effland, *supra* note 31, at 215. By eliminating the remote collaterals, the possible contestants to a will are also reduced, for any heir has an interest in a will and may therefore contest it. *See* FLA. STAT. §732.30 (1973).

66. Thus, to a large degree, the adoption of the "statutory estate plan" should eliminate much of the criticism of the current intestacy laws. There is one remaining problem, however, that is ignored by both the UPC and the 1974 Code. Under either plan, if a child predeceases the decedent, the spouse of the *child* is not provided for, contrary to the apparent desires of most testators. See Dunham, *supra* note 13, at 254. One commentator has suggested that this be remedied by including a provision giving the deceased child's share to the spouse, if the spouse has not married. Mulder, *supra* note 38, at 321. If the couple were childless, such a proposal deserves consideration as a method of more closely reflecting the intentions of the average decedent. If the predeceased child has left issue, however, the author's further proposal that the spouse serve as a substitute for the issue has less merit, for there is the possibility that the issue will be disinherited by the spouse. Therefore, only if the predeceased child left no issue should the legislature give consideration to substituting the child's spouse in his stead as a means of completing the succession hierarchy without extending it to the laughing heirs.

afterborn heir, and the alien.[67] The UPC suggests treating them the same in all respects as the natural heirs.[68] With the exception of retaining the half share for the half-blood,[69] the 1974 Code generally follows this recommendation and language.

The status of the adopted child is covered in section 732.108(1). The intended purpose of the Code is to make a complete substitution of families for inheritance purposes.[70] To the extent this is accomplished, present law will be altered in several respects. First, the adopted child will not be able to inherit from his natural parents or other natural relatives.[71] On the other hand, he will be able to inherit from adoptive relatives beyond brothers and sisters.[72]

While the intent of the 1974 Code is clear, the language used is not felicitous. It elected to state the matter thus:

> If a relationship of parent and child, for purposes of intestate succession, must be established to determine succession *by, through, or from a person,*
> (1) An adopted person is the child of an adopting parent and not of the natural parents of [*sic* – should read "or"] of any prior adoptive parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.[73]

As long as the problem is to determine intestate succession between the adopted and adopting parties, the statute seems clear – "an adopted person is the child of an adopting parent" – and is a continuation of our present law.[74] Nor is there a problem with succession between the adopted child and his natural parents – "an adopted person is . . . not [the child] of the natural parents."[75] This continues our present law that the natural parents cannot

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67. Because the latter two affect wills as well as intestate succession they are discussed later. See text accompanying notes 310-315, 347-349 *infra.*

68. UPC §§2-107, -109, -112. *See also* UPC §2-109, Comment.

69. FPC §732.105 (1974). See note 44 *supra.*

70. *See* UPC, art. 2, pt. 1, General Comment.

71. See text accompanying notes 73-76 *infra.*

72. See text accompanying notes 73, 77-86 *infra.*

73. FPC §732.108(1) (1974). Under the statutory plan of the UPC, this is not the only provision affecting adopted children. Indeed, it has been observed that it is necessary to "construe as many as seven provisions in the [UPC] to resolve . . . [the status of the adopted child]." Lilly, *The Uniform Probate Code and Oklahoma Law: A Comparison,* 8 TULSA L.J. 159, 168 (1972). The seven provisions include: three definitional sections, 1-201(3) (defining "child"); 1-201(21) (defining "issue"); and 1-201(28) (defining "parent"); two provisions providing the order of succession, §§2-102, -103; the section concerning representation, §2-106; and the actual section relating specifically to adopted persons, 2-109(1). The legislature, however, adopted neither the definitional sections nor the modified provisions dealing with the order of succession and representation. Because of these omissions, which leave several gaps in the actual adopted child provision, the possibility is even greater that the intent of the legislature will not be followed. See text accompanying notes 81-86 *infra.*

74. See FLA. STAT. §731.30 (1973).

75. FPC §732.108(1) (1974).

inherit from the child after adoption, but changes existing law that allows the child to inherit from them.[76]

When succession by or from other parties is involved, however, the language of the statute is open to different interpretations. As one commentator observed:

> If the "by, through, or from" language in this provision is given its "fullest effect," it seems reasonable to conclude that . . . "natural" relationships are created by law for the adoptee as if he had been a "natural" child of his adopting parents.[77]

Nevertheless, other conclusions can be reached.[78] Technically an heir can never inherit "through" another person, but must always take in his own right; that is, he must fit the statutory wording describing the takers. In the new statute, he must be a "lineal descendant" of the decedent, a brother or sister, a descendant of a deceased brother or sister, et cetera.[79] Only after it has thus been determined that a person is entitled to share in an intestate estate is a determination of whether he takes "through" another important in determining the *size* of the share to which he is entitled.[80]

Had the Florida courts not shown a predilection for strict construction of the intestacy provisions concerning the status of adopted children, these distinctions would be of less importance. But in a line of cases, of which *In re Hewett's Estate,*[81] is the most noted, they have adhered to:

> [T]he traditional "blood of the blood-bone of the bone" view of succession, thereby generating a hybrid complex of inheritance rights that stigmatize the adoptee as a second class citizen.[82]

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76. FLA. STAT. §731.30 (1973). The new provision is not applicable if the natural parent is the spouse of the adopting parent. FPC §732.108(1) (1974). It is unclear, however, whether the inheritance rights by or from other natural relatives are similarly abolished. If so, this also departs from existing law. *See In re* Estate of Levy, 141 So. 2d 803 (2d D.C.A. Fla. 1962), in which the court allowed the decedent's natural sister and the children of a natural brother to share in his estate, even though both the sister and the brother had been adopted by others. The rationale was that the current statute, FLA. STAT. §731.30, was a grant of rights to the adopted child and did not imply that adoption should abolish rights that previously existed. The precedential value of the decision under the 1974 Code is considerably lessened, however, by the court's statement that "the purpose of §731.30 would not be defeated by allowing the appellants to inherit from their natural kindred." 141 So. 2d at 806. The current law allows the child to inherit from the natural parents, while the new provision expressly provides otherwise. *Compare* FPC §732.108(1) (1974), *with* FLA. STAT. §731.30 (1973).

77. Lilly, *supra* note 73, at 169 (footnotes omitted).

78. *Id.* at 169 n.72.

79. See FPC §732.103 (1974).

80. This distinction has been recognized in Florida, at least in dictum. *See In re* Estate of Davol, 100 So. 2d 188, 190 (3d D.C.A. Fla. 1958).

81. 153 Fla. 137, 13 So. 2d 904 (1943). *See also In re* Estate of Levy, 141 So. 2d 803 (2d D.C.A. Fla. 1962); *In re* Poole's Estate, 53 Fla. 610, 15 So. 2d 323 (1943).

82. Smith & Fawsett, *Florida Adoption and Intestate Succession Laws: A Legal Paralogism,* 24 U. FLA. L. REV. 603, 610 (1972).

This adherence to the traditional view has been accomplished in spite of statutory language seemingly to the contrary,[83] on the ground that the statutes did not "*expressly* make the adopted child the heir at law or lineal descendant of the *ancestors or blood kindred* of the adoptive parents."[84] This same argument could be advanced to continue the *Hewett* result under the new statute. The success of such an argument is even more likely because the new statute fails to include the sections of the UPC defining "child" and "parent" that seem necessary to interpret the adoption provision.[85] Therefore, the legislature should amend this section and leave no doubt about its intent to effectuate a complete transposition of families for the adopted child.[86]

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83. Prior to 1973, §731.30 provided: "[A]n adopted child, whether adopted under the laws of Florida or any other state or country, shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents . . . ." FLA. STAT. §731.30 (1971). Section 63.151 provided: "By any judgment or decree of adoption, the child shall be the child and legal heir of the adopting parent or parents, entitled to all rights and privileges, and subject to all obligations, of a child born to such parent or parents in lawful wedlock." FLA. STAT. §63.151 (1971). As one commentary has observed, however: "These statutes through judicial construction . . . have been determined to mean: (1) the adoptee inherits *from* all his natural (blood) kindred including his natural parents; (2) all the natural (blood) kindred *except* the natural parents inherit from the adoptee; (3) within the adoptive family, intestate succession is strictly limited to inheritance by and from the adoptee, his adopted parents, and the natural and adopted children of the adoptive parents. The adoptee may *not* inherit by intestacy from any other adopted kindred." Smith & Fawsett, *supra* note 82, at 609 (emphasis in original).

84. *In re* Hewett's Estate, 153 Fla. 137, 140, 13 So. 2d 904, 906 (1943) (emphasis in original).

85. The comment to the UPC section says: "The definition of 'child' and 'parent' in Section 1-201 incorporates the meaning established in this section thus extending them for all purposes of the Code." UPC §2-109, Comment. Perhaps by omitting the definitions of "child" and "parent" from the definitional section of the Florida Code, the legislature intended to prevent adopted children from being treated as natural children for purposes other than intestate succession, such as will interpretation. Nevertheless, the omission still poses interpretation problems because of the use of undefined language in FPC §732.108. Moreover, the order of succession statute refers to lineal descendants, not issue, as in the UPC. Thus, it becomes even more plausible for a successful argument to be made that §732.108, by proving that the adopted person is a child rather than a lineal descendant, does not extend to the relatives of the adopting parent.

86. To best achieve this result the authors recommend that FPC §732.108 be amended and that two sections be adopted instead of the present one. This would also involve a renumbering of present FPC §§732.109-.111. The suggested statutes would read as follows:

> 732.108 *Adopted persons.*—For the purpose of intestate succession by or from an adopted person, the adopted person is a lineal descendant of an adopting parent and a natural kindred of all members of the adopting parent's family mentioned in section 732.103 and is not a lineal descendant of his natural parents nor a kindred of any member of his natural family or of any prior adoptive family, except that adoption of a child by the spouse of the natural parent has no effect on the relationship between the child and that parent or that parent's family.
>
> 732.109 *Persons born out of wedlock.*—In cases not covered by section 732.108, a person born out of wedlock is a lineal descendant of the mother and a kindred of all members of the mother's family mentioned in section 732.103. The person is also a lineal descendant of the father and a kindred of all members of the father's family mentioned in section 732.103, if: (a) the natural parents participate in a marriage ceremony, before or

The status of illegitimates is covered in subsection (2) of 732.108, and is therefore subject to the same uncertainty as to its application as is the provision for adopted children.[87] Otherwise, there has been little substantive change.[88] A person born out of wedlock apparently continues to be the heir of the mother, although the language has been altered to read that the person is the "child of a [*sic*] mother"[89] – again, without defining "child." The illegitimate is also considered the "child" of the father if the natural parents married before or after the child's birth, or "the paternity is established by an adjudication."[90] The former provision is largely a continuation of present law;[91] the latter is a substitution for the current provision allowing the father to acknowledge himself in a writing signed in the presence of a competent witness.[92] Nevertheless, the change is probably inconsequential, because an adjudication presumably could be obtained after the death of the father on the basis of such writing.[93]

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after the birth of the child, even though the attempted marriage is void; or (b) the paternity is established by an adjudication.

For reasons discussed in the text accompanying notes 87-96 *infra*, the latter subsection should be further amended to read:

(b) the paternity is established by an adjudication, except that paternity so established is ineffective to qualify the father or his kindred to inherit from the child unless the father has openly treated the child as his, and has not refused to support the child.

87. See text accompanying notes 77-86 *supra*.

88. *Compare* FPC §732.108(2) (1974), *with* FLA. STAT. §731.29 (1973). In 1968 two Supreme Court decisions held that a state wrongful death statute could not discriminate among beneficiaries solely on the basis of legitimacy. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). In the wake of these decisions, several courts held that all classifications based on illegitimacy were constitutionally invalid. *E.g.*, Munn v. Munn, 450 P.2d 68 (Colo. 1969) (support); *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968) (inheritance). It is doubtful, however, if this prohibition extends to either the current or new provisions concerning inheritance. Neither section makes a classification between legitimates and illegitimates; rather, these sections establish that all children have the right to inherit equally from their natural parents, and merely provide evidentiary requirements necessary for the proof of paternity. For a detailed discussion of this problem, see Note, *Uniform Probate Code — Illegitimacy — Inheritance and the Illegitimate: A Model for Probate Reform*, 69 MICH. L. REV. 112 (1970).

89. FPC §732.108(2) (1974).

90. *Id.* Paternity is considered established if "[t]he natural parents participated in a marriage ceremony before or after birth of the child, even though the attempted marriage is void . . . ." FPC §732.108(2)(a) (1974).

91. A child either conceived or born in lawful wedlock is legitimate. *E.g.*, Illgen v. Carter, 123 So. 2d 368 (2d D.C.A. Fla. 1960); Sanders v. Yancey, 122 So. 2d 202 (2d D.C.A. Fla. 1960). In fact, the Supreme Court of Florida has held that children born in wedlock are presumed to be legitimate and the fact that the child was conceived out of wedlock and that the marriage of its parents was annulled before its birth did not overcome the presumption. *In re* Ruff's Estate, 159 Fla. 777, 32 So. 2d 840 (1947). FLA. STAT. §742.091 (1973) currently provides that the subsequent marriage of the natural parents legitimatizes the child for all purposes.

92. FLA. STAT. §731.29 (1973).

93. The phrase of the UPC requiring the adjudication to be made "before the death of

As enacted, the new section has at least one potential failing, in addition to the uncertainty of the scope of its application because of the introductory sentence of the section.[94] The legislature eliminated a portion of the UPC provision that negated any adjudication that would "qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child."[95] The reasons for this elimination are not clear, for certainly the policy of the provision is to encourage acknowledgement and support. The failure of the legislature to include this provision would conceivably allow a father to postpone acknowledgement until it would benefit him. For this reason, the deleted language should be reinserted.[96]

WILLS

The will provisions of the 1974 Code[97] contain no dramatic changes comparable to the "statutory estate plan" for intestacy. While following the structure of the UPC, the provisions for the most part are taken, with editorial changes, from existing law. Two desirable recommendations of the UPC were adopted,[98] but many others of equal desirability were either overlooked or deliberately rejected.[99]

Execution

As under current law, any person of sound mind over 18 years of age may make a will.[100] The required formalities, however, have undergone several changes, although not enough to modernize this area of the law. It has been pointed out that once the law has granted the power to make a will, the law and the courts should favor giving effect to an intended exercise of that power; that formalities of execution should be limited to those needed to assure that the testamentary power was intended to be exercised; and that such requirements "surely should not be revered as ends in themselves, enthroning formality over frustrated intent."[101] It also should be recalled that our requirements for execution stem almost without change from the original Statute of Frauds and that the formalities needed to assure effectuation of a testator's intent in England in 1676 may be quite unnecessary in contemporary society.[102] After

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the father," UPC §2-109(2)(ii), has been omitted in the 1974 Code, suggesting that this determination can be made at any time.

94. See text accompanying notes 73-86 *supra*.

95. UPC §2-109(2)(ii).

96. See note 86 *supra* for a suggested statute.

97. Although only part 5 of chapter 732 is entitled "Wills," provisions concerning a pretermitted spouse or child are discussed here because they are concerned solely with testamentary dispositions.

98. See text accompanying notes 126-135, 150-153 *infra*.

99. See text accompanying notes 120-125, 158-162 *infra*.

100. *Compare* FPC §732.501 (1974), *with* FLA. STAT. §731.04 (1973).

101. Gulliver & Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1942).

102. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was

carefully weighing these and other criticisms of current probate law, the UPC draftsmen conclude: "If the will is to be restored to its role as the major instrument for the disposition of wealth at death, its execution must be kept simple."[103]

Unfortunately, this goal is not realized by the 1974 Code. Nuncupative wills are abolished[104] and the UPC's express recognition of holographic wills[105] is rejected. As a result, Florida law will now require that every will or codicil[106] be in writing and that the testator:

> Must sign his will at the end or acknowledge his signature to it or some other person in his presence and by his direction must subscribe the testator's name to it, in the presence of at least two attesting witnesses present at the same time.[107]

The retention of the requirement that the will be signed "at the end" perhaps may be supported by the normality of signing in this position, as well as its evidentiary value in showing a completed document,[108] but the UPC chose on balance to eliminate the requirement.[109] It is even more difficult to

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laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

103. UPC art. 2, pt. 5, General Comment.

104. Section 732.502 provides: "*Every* will must be in writing and executed as follows . . ." (emphasis added). Current law expressly provides for nuncupative wills, in both §731.07, "[e]very will, other than a nuncupative will" and in §731.06 (requisites of nuncupative wills). This abolition of nuncupative wills is in accord with the UPC (see UPC §2-502) and is applauded by several commentators. O'Connell & Effland, *supra* note 31, at 242; Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 550 (1948).

105. UPC §2-503. The reason for the provision was to accommodate those who were unable or did not desire legal advice. UPC §2-503, Comment; Curry, *supra* note 31, at 157. Although the virtual necessity of legal counsel is one of the criticisms of the probate laws, the wish to avoid the numerous legal contests arising in jurisdictions recognizing holographic wills is perhaps sufficient reason for not according them special status. *See, e.g., In re* Estate of Oldham, 203 Cal. 618, 265 P. 183 (1928); *In re* Estate of Major, 89 Cal. App. 238, 264 P. 542 (Dist. Ct. App. 1928): Paine v. Sanders, 135 So. 2d 188 (Miss. 1961). It has been observed that most of these problems deal with construction rather than authenticity and therefore holographic wills should be recognized. Curry, *supra* note 31, at 157. This approach, however, fails to consider that many of the construction problems deal with whether the writing was, in fact, intended as a will, that is, if there was a testamentary intent. If this problem could be avoided. the provision recognizing holographic wills would have much more to commend it.

106. Section 732.502(5) requires a codicil to be executed with the same formalities as a will.

107. FPC §732.502 (1974).

108. Gulliver & Tilson, *supra* note 101, at 5-6.

109. UPC art. 2, pt. 5, General Comment. The requirement for a signature at the end of a will is to avoid "the subjective subtleties which . . . follow in the wake of Lemoyne v. Stanley [83 Eng. Rep. 545 (1681) (holding that testator had signed his will when he wrote 'I, John Stanley, make this my last will.')] and also to minimize the opportunity for subsequent additions to the will." T. ATKINSON, *supra* note 12, at 303. This requirement has given rise to much litigation and has invalidated a number of otherwise unquestionable wills. *Id.* The litigation involves the meaning of "the end" of the will — that is, whether it is the physical end or the logical end. Most courts hold that it is the logical end, but the

justify retention of the requirement that the two attesting witnesses be "present at the same time." This is not required by the laws of most other states,[110] is rejected by the UPC,[111] and seems to put an undue premium upon legal "know-how."[112] Equally undesirable is the retention of the "purging" statute,[113] which voids gifts to attesting witnesses unless there are two other disinterested attesting witnesses to the will. The prototype of this statute was enacted in 1752,[114] as an alternative to declaring the entire will invalid. At that time interest absolutely disqualified a potential witness from testifying in court.[115] This evidentiary rule was abrogated long ago in this state[116] and interest of a witness now bears only on his credibility, not his ability to testify.[117] The UPC recommends that this eighteenth century relic be abandoned.[118]

In summary, each of the above provisions finds its principal justification in tradition; each adds an unneeded requirement, which in combination substantially impairs the desirable objective that execution be kept simple. The legislature should modernize the requirements of execution by repealing these

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question is unnecessarily open to litigation. *See, e.g.*, Estate of Chase, 51 Cal. App. 2d 353, 124 P.2d 895 (Dist. Ct. App. 1942); *In re* Estate of Stinson, 228 Pa. 475, 77 A. 807 (1910). *See also* T. ATKINSON, *supra* note 12, at 303; Curry, *supra* note 31, at 155. The UPC avoids this problem by simply requiring that the wills be "signed by the testator or in the testator's name by some other person in the testator's presence by his direction." UPC §2-502.

110. Only New Jersey, Rhode Island, and Florida require the witnesses to be present at the same time; nine others (Indiana, Iowa, Louisiana, South Carolina, Tennessee, Utah, Vermont, West Virginia, and Wisconsin) require the witnesses to sign in the presence of each other.

111. UPC art. 2, pt. 5, General Comment.

112. See text accompanying notes 130-134 *infra.*

113. *Compare* FPC §732.502(3) (1974), *with* FLA. STAT. §731.07(5) (1973). The witness is entitled, however, to so much of the gift as does not exceed the share of the estate that would be distributed to him "if the will were not established." The quoted language of this "saving" clause has been interpreted to apply only to a gift to the heir-witness. It is not available to save the gift to a witness who was a beneficiary under a prior will that would be effective if the later will were not established. *In re* Estate of Lubbe, 142 So. 2d 130 (2d D.C.A. Fla. 1962). Such a restricted interpretation is unnecessarily destructive of the testator's intent. In the somewhat analogous situation of a gift to charity being invalid if made with 6 months of death, the legislature has seen fit to recognize a longstanding intent of a testator evidenced by a prior will as sufficient to save the otherwise invalid gift in the later will. See §732.803 of the 1974 Code discussed in notes 280-286 *infra.*

114. 25 Geo. II c. 6 (1752).

115. J. WIGMORE, EVIDENCE §576 (3d ed. 1940).

116. FLA. STAT. §90.05 (1973).

117. J. WIGMORE, *supra* note 115, §§966, 1514.

118. The drafters of the UPC believe that a purging statute is unnecessary because "a substantial gift by will to a person who is one of the witnesses to the execution of the will would in itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence." UPC §2-505, Comment. Furthermore, they argue that "the requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses." *Id.* Thus, the intent is not "to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home drawn will would no longer be penalized." *Id.*

provisions and adopting in their place the appropriate provisions of the UPC.[119]

Another situation where technicalities of execution may easily frustrate a clearly expressed testamentary intent concerns a will executed outside the state in accordance with the law of the place of execution.[120] The extent to which such a will is recognized as valid in Florida if it does not meet Florida's requirements for execution is of particular importance because of the state's rapid growth as a retirement mecca and winter retreat. The problem of retirees who become residents of Florida after having made their wills in their former domiciles is somewhat different from that of the winter visitors who maintain second homes in Florida. The retirees' concern is whether as new residents of the state their old wills are valid to dispose of all property wherever located so that their over-all estate plans will be effectuated. The winter visitors' concern is whether as nonresidents their wills are valid to dispose of their property located in Florida. Under current law a retiree's will is invalid for all purposes after a change of residence, whereas the will of a winter visitor is effective to devise personal property in the state but ineffective as to real property[121] as long as the present residence is retained.[122] The 1974 Code remedies the above discrimination against Florida residents and also validates the will of the nonresident as it applies to realty.[123] The discrimination is compounded, however, in the case of an emergency will. Assume that while

119. If subsection (3) of §732.502 is repealed, subsection (2) of §732.504 should also be changed to eliminate the opening phrase "[s]ubject to the provisions of §732.502(3), F.S." At first glance it is somewhat anomalous that this subsection was included in the 1974 Code after it was decided to retain the "purging" statute. The reason for its inclusion in the UPC is clear. Because the "purging" statute was being eliminated, it was desirable to include an affirmative statement that a will is not invalid because signed by an interested witness. However, even with the "purging" statute this subsection may operate to prevent litigation over whether an indirect interest — such as the witness who is the spouse or parent of a legatee — which would not be purged, would invalidate the will.

120. If the testator seeks legal advice in making his will, execution probably will be in accordance with the law of the place where it is executed.

121. FLA. STAT. §731.07(3) provides: "No will executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state unless it is executed in accordance with the laws of this state in force at the time of its execution, except that a will valid under the laws of the state or country in which the testator is domiciled at the time of his death is valid in this state, so far as it relates to personal property."

122. If the nonresident moves his residence to a state other than Florida the continued validity of his will in Florida would depend upon whether it was executed in accordance with the laws of his new residence because the statutory exceptions apply only to (1) wills of nonresidents and (2) wills valid under the laws of the state of domicile at death. In a highly mobile society, tying validity to the laws of the domicile at death seems likely to frustrate the intent of many testators and therefore is undesirable.

123. Section 732.502(2) reads: "Any will, other than a holographic or noncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the testator resided at the time of execution."

Conceivably the statute could be construed to apply only to wills of persons who died as nonresidents of Florida and not to wills executed prior to becoming a resident of the state. If so, the discrimination against retirees who become residents of the state continues in aggravated form.

traveling outside the state of his residence, a retiree or winter resident executes a new will in accordance with the laws of the place of execution. If the retiree's will is not executed according to the 1974 Code, it is ineffective for all purposes. In the case of the winter visitor, however, the will is valid in Florida for both real and personal property if it is executed in accordance with the law of the state of his residence. This discrimination could be remedied by adopting the suggested UPC provision[124] or by changing subsection (2) of section 732.502 of the 1974 Code to read: "Any will, other than a holographic or nuncupative will, executed before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where it was executed."[125]

A final problem with the new execution requirements is exposed by an examination of the otherwise desirable section on self-proved wills — section 732.503. First introduced in Florida in 1973,[126] the section was taken verbatim from the UPC[127] and was designed to provide a method of admitting a will to probate without testimony of any subscribing witness if a specified affidavit had been executed by the testator and the witnesses.[128] Although the form of the affidavit has been modified by the 1974 Code, a potential problem remains that could affect the validity of any will, not just those purporting to be self-proved. The form of affidavit specified by the current section contains three declarations that are not expressly required for a valid execution by section 732.502: (1) that witnesses signed "in the presence" of the testator; (2) at his request; and (3) an opinion of the witnesses about the testator's capacity to make a will.[129] The 1974 Code omits the latter two but retains a statement in the affidavit that "each of the witnesses in the presence of the testator, and in the presence of each other signed the will as a witness."[130] The requirement

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124. UPC §2-506 provides that a written will is valid if executed in compliance with local law (such as §732.502(1) of the 1974 Code): "[O]r if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national."

This would validate holographic wills of Florida residents as well as nonresidents if the will were executed in a state that recognized holographic wills.

125. The usual situation where the broader language of the UPC might be needed to validate a will would be where the execution did not comply with either Florida law or the law of the place of execution because the testator, presumably without legal advice, elected to follow the more familiar law of his own country, residence, or abode. This possibility becomes of less importance if holographic wills are not to be recognized even in the case of nonresidents of the state.

126. Fla. Laws ch. 73-8, §1, *enacting* FLA. STAT. §731.071 (1973).

127. UPC §2-504.

128. Aside from this, however, a self-proved will is no different from any other will and "may be contested (except in regard to signature requirements), revoked, or amended by a codicil in exactly the same fashion as a will not self-proved." UPC §2-504, Comment. The affidavit may be executed at the same time as the will, or at any subsequent date, and notarized and attached to or following the will in substantially the form prescribed by statute. FLA. STAT. §731.071 (1973).

129. *Id.;* UPC §2-504.

130. FPC §732.503 (1974).

that the witnesses sign in the presence of the testator stems from the original Statute of Frauds and is found in most of the wills acts in this country.[131] The meaning of "presence" has caused considerable litigation concerning whether the testator must be able to see the witnesses sign (the "sight test") or merely be aware of their signing through his other senses (the "conscious presence" rule).[132] The existence of the requirement is regularly deplored[133] and at least one court has held that the requirement does not exist in Florida.[134] It would be most unfortunate for the requirement to be imputed to the provisions of section 732.502(1) because of the form of affidavit of the self-proved will.[135] To avoid this possibility the legislature should delete from the affidavit the phrase "in the presence of the testator, and . . . ."

Relaxation of the Requirements of Formal Execution

The increasing use of complex trust arrangements makes it both convenient and advisable to refer to an existing instrument in a will, rather than to reproduce its contents entirely.[136] Case law in a majority of states, including Florida,[137] allows the contents of the document to be incorporated into the will by reference.[138] This doctrine was codified by the UPC,[139] and has been adopted by the 1974 Code. The new section simply requires that the writing be described sufficiently and be in existence at the time of execution, and that the intent to incorporate it be manifest in the language of the will.[140]

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131. *See* Rees, *American Wills Statutes,* 46 VA. L. REV. 613, 614-25 (1960).

132. 74 A.L.R.2d 318 (1960).

133. T. ATKINSON, *supra* note 12, at 340; 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS §19.127 (1960); Gulliver & Tilson, *supra* note 101, at 10-11. All of these authorities have stated that very little fraud is prevented by compliance with this particular provision. Atkinson further states: "It is sometimes assumed that the requirement is for the satisfaction of the testator himself. If so, it is rather strange that the will should be held invalid for disregard of this provision, especially if the testator has permitted the witnesses to sign outside of his presence. A more plausible reason for the provision is that it promotes compactness and solemnity of the execution ceremony. On the whole, there is not sufficient basis in policy for a strict construction of the provision." T. ATKINSON, *supra* note 12, at 340-41.

134. *In re* Leo's Will, 12 Fla. Supp. 61 (Cir. Ct. Dade County 1958). *Cf. In re* Estate of Watson, 226 So. 2d 249 (1st D.C.A. Fla. 1969).

135. Concerning the effect on a self-proved will of the failure of the witnesses to sign in the presence of the testator, alternative results could be reached: (1) the will is invalid because this requirement is implied into the provisions of §732.502(1); (2) the will is valid, but cannot be self-proved; or (3) the will is valid and may be self-proved because the affidavit need only be substantially in the form suggested. FPC §732.503 (1974). The third alternative seems most desirable.

136. Thus, a testator may wish to dispose of certain property according to the provisions of an existing trust, or utilize a lengthy provision of another document in his will, rather than repeat the provision. It is more convenient to simply refer to the other writing and thereby incorporate it into his will, thus avoiding any chance of error.

137. Forsythe v. Spielberger, 86 So. 2d 427 (Fla. 1956).

138. T. ATKINSON, *supra* note 12, at 385.

139. UPC §2-510.

140. FPC §732.512 (1974).

Another device popular among estate planners is the use of the "pour-over" provision in the will.[141] In many instances, the devise to the trust may be accomplished under the doctrine of incorporation by reference or by reference to acts of independent significance. If the trust is amendable or revocable, however, or if it contains only minimal assets, the devise could be invalidated for failure to comply with the formalities of execution.[142] Florida has avoided this problem to a large degree by statutory language allowing wide latitude in the types of trusts to which a valid devise may be made.[143] This provision is continued in the 1974 Code with only editorial changes.[144]

In light of this provision and the adoption of the section on incorporation by reference, it is interesting to note that section 2-512, a similar UPC provision dealing with events of independent significance, was not also adopted. Perhaps this was inadvertent, or it may have been thought that section 2-512 was not needed because the 1974 Code continues the above section concerning devises to trustees.[145] The doctrine of independent significance, however, is

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141. This is simply a provision directing that certain probate assets, usually the residuary, be added to an existing trust. For many of the same reasons that underlie the doctrine of incorporation by reference, the terms of the trust are not reproduced in the will. See note 136 *supra*.

142. Thus, if the trust has been amended after the execution of the will, the amendment may invalidate the pour-over provision. Even if it does not, the question remains whether the amendment will be given effect or whether the terms existing at execution will be enforced. Finally, if the testator relies upon acts of independent significance, there is doubt whether the doctrine may be utilized with a trust containing only minimal assets, such as an unfunded insurance trust. *See* O'Connell & Effland, *supra* note 31, at 244-45; Curry, *supra* note 31, at 166-67. For a discussion of the Florida problems arising in this area, see Emanuel, *Revocable Trusts—Do They Solve or Create Problems?*, 46 FLA. B.J. 78 (1972); Hart, *Inter vivos Trusts: Unanticipated Connotations*, 46 FLA. B.J. 16 (1972); Roth, *Rebirth of Revocable Trust in Florida*, 44 FLA. B.J. 82 (1970).

143. FLA. STAT. §736.17 (1973). Both this section and its companion, §689.075, mingle the doctrines of incorporation by reference and acts of independent significance.

144. FPC §732.513 (1974). The section provides that a valid devise may be made to an existing trust or one executed concurrently with the execution of the will if the trust is identified in the will. The devise is not invalidated for any or all of the following reasons:

"(a) Because the trust is amendable or revocable, or both, by any person; or (b) Because the trust has been amended or revoked in part after execution of the will or codicil to it; or (c) Because the trust instrument or any amendment to it is not executed in the manner required for wills; or (d) Because the possible expectancy of receiving benefits as a named beneficiary of a life insurance policy deposited, or to be deposited, which is the trustee's only trust res, and even though the testator or some other person has reserved any or all rights of ownership in the insurance contracts, including the right to change the beneficiary; or (e) Because of any of the provisions of §689.075 F.S." *Id.*

FPC §732.513 also states: "(3) [T]he devise shall disclose the property under the terms of the instrument that created the trust, as theretofore or thereafter amended; (4) The entire revocation of a trust by an instrument in writing before the testator's death shall invalidate the devise of the bequest; (5) Unless the will provides otherwise, the property devised shall not be held under a testamentary trust of the testator, but shall become a part of the principal of the trust to which it is devised; (6) This section shall be cumulative to all laws touching upon the subject matter." *Id.*

Although different in format, there is no significant difference between this provision and that suggested by UPC §2-511.

145. See notes 143-144 *supra* and accompanying text.

broader than devises to trustees.[146] While existing case law may well cover such situations,[147] the adoption of a specific statutory authorization could easily prevent future unnecessary litigation,[148] a policy underlying many of the new provisions.[149]

The failure to adopt UPC section 2-512 is even more questionable in light of a new provision, adopted from the UPC, that relaxes strict adherence to the incorporation by reference doctrine. The section allows a will to dispose of items of tangible personal property not otherwise the subject of specific devise, by simply referring to a written statement that may be prepared before *or after* the execution of the will.[150] While certain types of property are excluded,[151] the relaxation of the usual formal requirements is made more evident by the fact that the writing may be altered by the testator after its preparation and that it need not have any independent significance.[152] This seems a desirable addition to Florida law for the usual gifts of mementos to friends. It could be abused, however, in the case of valuable paintings or jewelry. In disposing of such objects it would seem desirable to retain the protections of the formalities of execution of a will.[153]

Revocation

General. The primary methods by which a will may be revoked have undergone only editorial modifications. Thus, in spite of several format changes, the 1974 Code continues to provide three methods of revocation: (1) by a subsequent writing that expressly or impliedly revokes the will or any part of

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146. *See* T. ATKINSON, *supra* note 12, at 394-98.

147. *See* Howe v. Fry, 116 Fla. 528, 157 So. 331 (1934) (sustaining devise to "servants in my employ at the time of my death"). Although there appear to be no Florida cases on point, devises of "the automobile owned by me at my death" or "to the woman whom I may marry" have been sustained in other jurisdictions. *See, e.g.,* Reinheimer's Estate, 265 Pa. 185, 108 A. 412 (1919); Metcalf v. Sweeny, 17 R.I. 213, 21 A. 364 (1891); Brook v. Kent, 13 Eng. Rep. 136 (1840).

148. The failure to adopt what is essentially a companion provision to incorporation by reference could be argued to be a legislative rejection of the doctrine of acts of independent significance, except as applied to trusts.

149. See text accompanying notes 191-210, 323-337 *infra,* concerning the new provisions designed to specify when ademption or satisfaction occur, thus removing much of the necessity of inquiry concerning the testator's intent.

150. FPC §732.515 (1974).

151. Money, evidence of indebtedness, documents of title, securities, and property used in a trade or business are specifically excepted. *Id.*

152. The section requires the writing to be signed by the testator, while the UPC provides the alternative of allowing it to be in the testator's handwriting even though not signed. *Compare* FPC §732.515 (1974), *with* UPC §2-513.

153. This could best be accomplished by including a dollar limitation in the provision. For example, the new statute could be amended to read: "items of tangible personal property *no one of which has the value of more than* _____ *dollars.*"

it;[154] (2) by a physical act intended to revoke the entire will;[155] or (3) by dissolution of marriage causing partial revocation.[156] Although the Florida version of the first method is more specifically worded, it has the same effect as the corresponding UPC provision.[157] Failure to follow the UPC in the latter two instances, however, leaves several traps for unwary testators that the UPC has avoided.

Partial Revocation by Act. Contrary to the recommendation of the UPC[158] and despite the evident belief of laymen and even some attorneys that such a revocation is effective,[159] the 1974 Code continues to prohibit a partial revocation by act.[160] Perhaps the prohibition was continued because of a fear of the possible litigation that could be engendered. But even when there has been an attempted act of total revocation, courts must often determine whether the act was sufficient and if it was done with the requisite intent.[161] Thus, it is doubtful that the burden of the courts would be measurably increased by recognizing the expectations of the average testator and permitting partial revocations by act.[162]

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154. FPC §732.505 (1974). This combines current §§731.12-.13 of the Florida Statutes and provides that revocation may be implied by a subsequent inconsistent will or be expressly stated in a subsequent written will, codicil, or other writing declaring the revocation, if the same formalities required for the execution of wills are observed in the execution of the subsequent instrument. If implied, the revocation extends only as far as the inconsistency exists. In any event, the revocation may be partial or total. *Id.*

155. FPC §732.506 (1974). Revocation in this manner may be accomplished by the testator, or some person in his presence and at his direction, "burning, tearing, cancelling, defacing, obliterating or destroying the will with the intent and for the purpose of revocation." *Id.*

156. Section 732.507 provides that all wills made by husband and wife, where the marriage has subsequently been dissolved, shall be void as the will affects the surviving divorced spouse. See text accompanying notes 169-176 *infra*. Section 732.507 also provides that a subsequent marriage, birth, or adoption will not revoke a will but that the pretermitted child or spouse will inherit as set forth in §§732.301, .302. See text accompanying notes 163-168 *infra*.

157. UPC §2-507(1) provides: "A will or any part thereof is revoked by a subsequent will which revokes the prior will or part expressly or by inconsistency . . . ." The official comment states that in the case of a subsequent inconsistent will, the court is left to the "determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially . . . ." UPC §2-507, Comment.

158. UPC §2-507 provides for revocation by writing or act and specifically applies to both total or partial revocation.

159. The case of *In re* Estate of Shifflet, 170 So. 2d 96 (3d D.C.A. Fla. 1964), is a recent example of this misunderstanding. See note 160 *infra*.

160. Section 732.506 begins: "A will is revoked . . . [by act]," whereas §732.505 is prefaced with: "A will or any part of it is revoked . . . [by a subsequent writing]." *See In re* Estate of Shifflet, 170 So. 2d 96 (3d D.C.A. Fla. 1964) (providing that partial revocation may only be accomplished by strict compliance with §731.13, the predecessor of FPC §732.505).

161. *E.g.*, Vaughn v. Vaughn, 217 Ala. 364, 116 So. 427 (1928); Porch v. Farmer, 158 Ga. 55, 122 S.E. 557 (1924); *In re* Burke's Will, 91 N.Y.S.2d 636 (Sur. Ct. 1949).

162. T. ATKINSON, *supra* note 12, at 445.

Pretermitted Spouse or Child. At common law a will was revoked by a woman's subsequent marriage, or upon the birth of a child after a man's marriage.[163] These rules were changed by the 1933 Probate Code[164] and since that time the will is not revoked[165] but the pretermitted spouse or child receives a share of the estate equal to his or her intestate share, except in a few rare instances.[166] With one addition, these provisions have been carried forward into the 1974 Code with only editorial changes.[167] Added in the case of the pretermitted child is an eminently desirable clause from the UPC that makes the section inapplicable if "the testator had one or more children when the will was executed and devised substantially all his estate to the other parent of the pretermitted child."[168]

Revocation by Dissolution of Marriage. The 1974 Code also carries forward, with only editorial changes, existing law that voids any part of the will affecting the surviving divorced spouse, without providing for the testator's possible remarriage to the former spouse.[169] Indeed, there seems to have been an intentional rejection of the UPC provision that "[i]f provisions are revoked solely by this section, they are revived by the testator's remarriage to the former spouse."[170] The failure to include such language seems most unfortunate. By combining the effect of the current provision with that of the pretermitted spouse,[171] the courts have reached results that seem clearly contrary to the expectations of testators who have divorced and later remarried the same spouse.[172] The current statute voiding will provisions for a divorced

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163. *Id.* at 422.

164. *Compare* Comp. Gen. Laws §§5461, 5463 (1927), *with* Fla. Laws 1933, ch. 16,103, §15; *see* Easterlin v. Easterlin, 62 Fla. 468, 56 So. 688 (1911) (in absence of statute, it is the law of Florida that a will is revoked in these situations).

165. FLA. STAT. §731.14(2) (1973).

166. FLA. STAT. §§731.10-.11 (1973). Exceptions are: if the testator expressed a contrary intent in the will; if, in the case of the spouse, there was a provision by marriage contract, or if the spouse was already provided for in the will. *Id.*

167. FPC §732.301 (spouse), §732.302 (child) (1974). These sections differ considerably from the more comprehensive sections in the UPC. See UPC §§2-301, -302.

168. FPC §732.302 (1974). See UPC §2-302(a)(2). Presumably the theory is that having omitted the known child or children, the testator has shown an intent to omit all his children whether born before or after the execution of the will. This result could also be reached under the more general exception "unless it appears from the will that the omission was intentional," FPC §732.302 (1974), but it seems desirable to make this explicit. The added language, however, will require interpretation of the phrase "substantially all his estate." *Id.*

169. *Compare* FPC §732.507(2) (1974), *with* FLA. STAT. §731.101 (1973).

170. UPC §2-508.

171. See notes 165-166 *supra* and accompanying text.

172. *In re* Estate of Guess, 213 So. 2d 638 (3d D.C.A. Fla. 1968); *In re* Estate of Bauer, 161 So. 2d 678 (1st D.C.A. Fla. 1964). In *Bauer* the testator devised his homestead to his widow and the balance of a considerable estate to paternal and maternal relatives. After the will was executed, the marriage was dissolved, but the parties remarried a year later. The widow successfully challenged the will on the grounds that she was a pretermitted spouse because the marriage occurred after the will was made and therefore she was not provided for in the will because the divorce had voided the devise. As a result, she took the

spouse was adopted in 1951[173] to reflect the probable intention of a testator whose marriage had been dissolved. There is normally no reason why, after a remarriage to the former spouse, the testator would not equally intend a reinstatement of the provisions of the former will.[174] Because there is almost always a drastic disruption of the testamentary plan by the application of the pretermitted child or spouse statutes, their use can be justified only in terms of protecting the spouse or child from inadvertent omission from the will.[175] If the clause that was revoked by divorce is revived, the spouse who has remarried the testator is provided for in the will and has the same protection as any spouse who is dissatisfied with the testamentary provisions – the right to elect to take one-third of the estate.[176] The UPC provision reviving such voided provisions of the testator's will seems badly needed in a modern probate statute.

Revival and Republication. By continuing with only editorial changes the existing statutory provisions on revival and republication,[177] the 1974 Code

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entire estate, obviously contrary to the intent of the testator. In *Guess,* because the voided devise was a part of the residuary estate, the court decreed a partial intestacy.

173. Fla. Laws 1951, ch. 26-914, §1, at 1063.

174. This was ignored by the *Bauer* court, perhaps due to their seeming distaste for such conduct:

"We are convinced that the legislative intent behind F.S. §731.101, F.S.A., was not to invest married persons with a spigot-like means to turn their testamentary attitudes off and on at random by the device of executing a will, following it with divorce, following it by remarriage, and so on ad infinitum. The legislative purpose was unquestionably directed toward curing the incongruous situation resulting when, as is usually the case, the divorced parties do not make successive excursions upon the sea of matrimony and the testator dies leaving a will extant containing benefits to the divorced spouse. The legislature might well have had in mind the fact that some deaths occur before the testator has had an opportunity following divorce to reframe or destroy the existing will or has simply neglected to do so; that if he desires the divorced spouse to participate in his estate, the better rule is to require a new will to be executed to that effect." 151 So. 2d 678, 680 (1st D.C.A. Fla. 1964).

While the prime purpose of the legislation was undoubtedly to prevent a divorced spouse from taking under a prior will, it is unlikely that the legislature considered the possibility of "successive excursions upon the sea of matrimony." Moreover, the court's concern for prohibiting "spigot-like means [by which the testators could] turn their testamentary attitudes off and on at random" seems misplaced, for the common law has long allowed acts of independent significance to affect the testamentary plan. See text accompanying notes 146-147 *supra.*

175. *See* T. ATKINSON, *supra* note 12, at 141.

176. FPC §§732.201-.204 (1974). See text accompanying notes 246-272 *infra.*

177. Thus, the revocation of a will that revokes a former will does not revive the former will. FPC §732.508. The revocation of a will continues to revoke all codicils to the will, FPC §732.509, and the execution of a codicil referring to a previous will republishes the will as modified by the codicil. FPC §732.510. Additionally, a will that has been revoked, or is invalid for any other reason, may be republished by reexecution of the will itself or by the execution of a codicil referring to it. FPC §732.511. The last section does add "or the execution of a codicil republishing it" to the existing statute, FLA. STAT. §731.18 (1973). This is no change, however, for §731.17 currently allows republication by codicil. Additionally, if the will were invalid for reasons other than revocation, case law has held a "codicil has the effect of republishing the will itself." Gair v. Lockhart, 45 So. 2d 193, 194 (Fla. 1950) (will originally invalidly executed). Possibly the omission in §732.508 of the

rejects "a limited revival doctrine,"[178] suggested by the UPC for situations where it is evident that a testator revoking a later will intends to reinstate the provisions of an earlier will.[179] This rejection seems unfortunate from the point of view of effectuating a testator's known intent, but may be justified in terms of avoiding the expense and delay of litigation necessary to determine when "it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed."[180]

RULES OF CONSTRUCTION

Due primarily to either the draftsman's lack of recognition of likely problems, or a lack of foresight in dealing with them, a variety of will construction problems regularly arise. Various solutions to these problems have been formulated by the courts and occasionally by the legislatures of different states. In some instances substantial unanimity is found, while in other situations diverse results are reached. Presumably to further uniformity throughout the country and to minimize future litigation, the UPC recommends codified solutions to several common problems. The 1974 Code accepts many of the UPC recommendations concerning both content and phraseology.[181] Nevertheless, the adoption of the UPC terminology, when coupled with the legislative failure to adopt one of its sections, could create for the unwary misapprehension about the application of those sections that were adopted.

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word "expressly" contained in the current §731.14 may expand the application of the provision to prevent revival of a former will that was revoked by the inconsistency of a later will. For example, a testator executes a will, later executing a second will that does not expressly revoke the first, but does revoke it by inconsistency. Still later, the second will is revoked. Under §731.14 the first will might be held to be revived because the second did not "expressly" revoke it. Under §732.508, however, this apparently could not be the result.

178. UPC §2-509, Comment.

179. UPC §2-509 reads:

"(a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

"(b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect."

180. UPC §2-509(a).

181. The legislature failed to adopt the first three of these UPC provisions. The first was rejected because of a preference for the existing simultaneous death statute, instead of the UPC requirement that an heir or devisee survive for a fixed period in order to share in the estate. *Compare* FPC §732.601 (1974), *with* UPC §2-601. The omission of the second provision, §2-602, which allows a testator to choose the state law to be used in determining the meaning and legal effect of his will, is an evidence of the parochialism of the 1974 Code. The reasons and effect of these rejections will be considered later. See text accompanying notes 316-322 and - *infra* (part II). The third affects the remaining rules and is therefore considered now.

Section 2-603 of the UPC, which was not included in the 1974 Code, declares the supremacy of the testator's intent.[182] Thereafter, this qualification is ignored in succeeding sections. By omitting the provision, several sections of the 1974 Code could be misread as stating a rule that operates despite a testamentary provision to the contrary.[183] Reference to the title of the Part should negate this, but it would seem better for the legislature to avoid the problem by adopting section 2-603.

Lapsed and Void Devises

If a beneficiary predeceases the testator, or for any other reason is unable to receive his gift, there arises the problem of the proper disposition of the property subject to the gift. If the testator has thought of the eventuality and provided an alternative disposition, it, of course, will be given effect. In the absence of such a testamentary provision, however, the proper disposition depends upon a variety of factors: the relationship of the testator and the donee, whether the donee left lineal descendants, whether the gift is a residuary or nonresiduary gift, and whether the gift is made to the donee as an individual or as a member of a class. Currently, the relevant Florida statute provides that unless a contrary intent appears in the will, a gift to a person who predeceases the testator, or who is dead at the time the will is executed, lapses unless the devisee or legatee is an adopted child or blood kindred of the testator who died leaving lineal descendants who survive the testator.[184] This result is somewhat altered by the 1974 Code's adoption of a modified provision of the UPC requiring the devisee to be a lineal descendant of the testator's grandparent, rather than merely a blood kindred of the testator.[185] As a result,

182. UPC §2-603 reads: "The intentions of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this Part apply unless a contrary intention is indicated by the will."

183. This misreading seems to be the basis for suggestions already made to the Probate Commission that §732.602 needs to be amended. The possibility of misapprehension is also enhanced for those comparing the language of the new sections with comparable sections of existing statutes, because existing sections expressly defer to a contrary intent in many instances—for example, §731.05(2) (will passes after-acquired property "unless the testator expressly states in his will that such is not his intention"), §731.20(2) (lapsed or void legacy becomes part of residue "unless a contrary intent is expressed by the testator in his will").

184. FLA. STAT. §731.20 (1973). The anti-lapse portion provides that the "descendants take the property . . . in the same manner as the devisee or legatee would have done had he survived the testator." *Id.* As noted earlier, many historical terminologies are eliminated from the 1974 Code, often because of the disappearance of any distinction between real and personal property in more modern provisions. See note 45 *supra.* Generally, these new definitions are adopted by this article. Thus, the term "devise" "includes the words gift, give, bequeath, bequest, or legacy," and therefore anyone who is designated in a will to receive a devise is simply termed a "devisee." FPC §§731.201(6), (7) (1974).

185. *Compare* FPC §732.603 (1974), *with* FLA. STAT. §731.20 (1973). The section is adopted from UPC §2-605 with two substantive changes. First, the UPC requirement that the issue of the deceased devisee survive the testator by 120 hours was dropped because of the continuation of Florida's simultaneous death statute in lieu of the UPC provision requiring all devisees to survive the testator by 120 hours. UPC §2-601. See text accompanying notes 316-322 *infra.* Second, the section allows per stirpes distribution rather than the

lapsed gifts will no longer be saved for remote kindred, thus conforming the anti-lapse statute to the elimination of the "laughing heir" in the intestacy provisions.[186] Moreover the new statute expressly covers class gifts, even if the devisee died prior to the execution of the will,[187] and therefore seems to go farther than existing case law that only extends the anti-lapse statute to class members living at the time of will execution.[188]

Although these provisions are a desirable modernization of Florida law, there is an inconsistency with the intestacy provisions that should be corrected. As will be discussed, a new statute prevents the deduction of a debt owed the decedent from the *intestate share* of any person except the debtor.[189] From a policy standpoint, there is no reason why the same protection should not be extended to those taking under the anti-lapse statute. Section 732.603 should be amended to include language appropriate to modify the effect of the right of retainer statute in this situation.[190]

Change in Property Holdings

The law pertaining to the effect of changes in the testator's property between the time of the execution of the will and the testator's death has undergone considerable modification and clarification. Presently no statute controls in these situations and many of the fact variations have not been passed upon by the Florida courts. The adoption of two UPC provisions by the 1974 Code should considerably reduce the litigation necessary to determine the Florida law in these situations.

UPC's per capital with representation. This too conforms to other provisions of the 1974 Code that differ from the UPC. See text accompanying note 42 *supra*, note 221 *infra*.

Because of a format change that follows the UPC, the general lapse provision is now contained in a separate section, FPC §732.604. This section also incorporates prevailing case law that if there are two or more residuary legatees and one's share fails for any reason, that share passes to the other residuary legatees in proportion to their interests in the residue. FPC §732.604(a) (1974). This conforms with the result reached in *In re* Clark, 212 So. 2d 72 (4th D.C.A. Fla. 1968) and Magruder v. Magruder, 157 So. 2d 86 (2d D.C.A. Fla. 1963).

186. See text accompanying notes 59-65 *supra*. Adopted children may have also been removed from the statute's coverage. See text accompanying notes 73-86 *supra*.

187. FPC §732.603 (1974).

188. Drafts v. Drafts, 114 So. 2d 473 (1st D.C.A. Fla. 1959). The testatrix had seven brothers and sisters, five of whom predeceased her leaving lineal descendants. Three of these had died prior to her execution of a will leaving the residuary of her estate to "my brothers and sisters, share and share alike." *Id.* The court applied §731.20 to the class members alive at execution, reasoning that the statute's use of the plural "blood kindred" manifested an intent to include class gifts in its coverage. Seemingly influenced by their interpretation of the testatrix's intent, however, the court "strictly construed" the statute to preclude application to the three brothers who had died prior to execution, because it dealt only with lapsed, rather than void, gifts.

189. FPC §732.109 (1974). The section simply provides the estate with statutory authorization for offsetting the amount of any noncontingent indebtedness of a distributee against the distributee's interest. See text accompanying notes - *infra* (part II).

190. The suggested amendment might be made by adding a sentence to the end of FPC §732.603 reading: "A debt owed to the testator by the deceased devisee shall not be charged against the lineal descendants of the deceased devisee taking under this section."

Accessions. Because of frequent changes in a testator's holdings of corporate securities due to mergers and consolidations, as well as the increasing use of stock splits and dividends,[191] courts regularly have been called upon to decide whether a specific legacy of corporate securities has either been adeemed, or alternatively, covers additional or substituted securities. The test generally followed in both situations is whether there has been a change in substance or merely a change in form.[192] While Florida follows this form-substance dichotomy,[193] there is an inherent weakness in the test. Every new variation in corporate financing creates the potential necessity for a judicial determination of whether the change in holdings is merely one of form, or results in an ademption because it is a change in substance. Adopted with one substantial difference from the UPC, a new section of the 1974 Code attempts to resolve this problem by detailing the particular changes in security holdings that will be covered by a specific devise.[194] The section attempts to obtain desirable flexibility to cope with future corporate innovations by including in this category essentially any change that is initiated by the entity;[195] all others are intended to be excluded.[196] Unfortunately, however, both the UPC and the Florida version unwittingly failed to provide for a frequent occurrence in the area — dividends whose declaration and record dates are prior to the testator's death, but that are payable thereafter.[197] The section, therefore,

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191. See Curry, *supra* note 31, at 177; O'Connell & Effland, *supra* note 31, at 253.

192. *See, e.g., In re* Frahm's Estate, 120 Iowa 85, 94 N.W. 444 (1903); Bool v. Bool, 165 Ohio St. 262, 135 N.E.2d 372 (1956). *See generally* Note, *Ademption by Extinction: The Form and Substance Test,* 39 VA. L. REV. 1085 (1953).

193. *In re* Estate of Watkins, 284 So. 2d 679 (Fla. 1973) (no ademption resulting from merger and resulting conversion of described stock, absent testator's change of intent); *In re* Vail's Estate, 67 So. 2d 665 (Fla. 1953) (stock split is change in form).

194. FPC §732.605 (1974). These are: "(a) As much of the devised securities as is a part of the estate at the time of the testator's death; (b) Any additional or other securities of the same entity owned by the testator because of action initiated by the entity excluding any acquired by exercise of purchase options; (c) Securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity . . . ." *Id. See* UPC §2-607.

The 1974 Code eliminates, however, subdivision (4) of the UPC that allowed a specific devisee to receive any additional securities owned by the testator as a result of a plan of reinvestment in a regulated investment company. Perhaps this was omitted because it was thought it would be too difficult to prove that the additional securities were the result of such a reinvestment plan.

195. See note 194 *supra.*

196. The statute provides that the specific devisee "is entited *only* to" the accessions enumerated in note 194 *supra.* FPC §732.605(1) (1974). In addition, subsection (2) provides that "[d]istributions before death of a specifically devised security not provided for in subsection (1) above are not part of the specific devise." FPC §732.605(2) (1974). See notes 197-198 *infra.*

197. While not readily apparent, the purpose of UPC §2-607 is to exclude cash dividends from the specific legacy in this situation, while including stock dividends or stock splits. Cash dividends are not provided for in subsection (a) and are therefore intended to be covered by subsection (b), which provides: "Distributions *prior to death* with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise." UPC §2-607(b) (emphasis added).

The Official Comment states that this language is: "[I]ntended to codify existing law to

should be amended to accomplish more fully its intent of reducing litigation in this area.[198]

Ademption. When property other than corporate securities is involved, the form-substance dichotomy has not been followed.[199] Instead, the general rule is that a specific devise of property that is not owned by the testator at his death is adeemed by extinction.[200] In most states, if the ademption is by ex-

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the effect that cash dividends declared and payable as of a record date occurring before the testator's death do not pass as a part of the specific devise even though *paid after death.*" UPC §2-607, Comment (emphasis added).

It is difficult to see, however, how dividends "paid after death" can fit the statutory language of "distributions prior to death." As far as cash dividends are concerned, therefore, the section would appear to be expressly limited to those actually paid prior to death.

The failure to exclude those dividends paid after death is not undesirable. If, as the Comment seems to imply, stock dividends or stock splits paid after death on a record date prior to death are to be considered part of the specific legacy, there is no good reason why cash dividends should not be accorded equal treatment. But it may be that even stock dividends will not be included in this situation, for the applicable provision refers only to "any additional or other securities of the same entity *owned* by the testator." UPC §2-607(a)(2) (emphasis added). While the testator would be entitled to them as of the record date, he would not actually own them until they were paid. Therefore, if the section were literally interpreted, neither stock dividends nor stock splits actually paid after his death would be covered at all.

The 1974 Code apparently attempted to avoid at least part of this problem by making the second subsection applicable only to distributions "of," rather than "with respect to" a specifically devised security. *Compare* FPC §732.605(2) (1974), *with* UPC §2-607(b). While this avoids application to dividends of any type and therefore the problem discussed above, it severely limits the scope of the section. Only distributions *of* the specifically devised security that were not initiated by the entity will be excluded from the specific devise. In order to broaden the scope of the section, the language of the UPC — "with respect to a specifically devised security" — should be reinstated. In this manner, litigation concerning *any* distributions prior to death that are not covered by subsection (1) will be avoided.

At the same time, however, the problems of the UPC provision should be cured by the addition of a fourth paragraph to subsection (1) that specifically covers the situation of a dividend or stock split that was declared and payable before the testator's death, but which was not actually paid until after death. A suggested provision is:

> (1) . . . the specific devisee is entitled only to . . . .
> (d) Distributions of cash or of securities described in subsections (a), (b), and (c) above that are received after the testator's death; and . . . .

Such a provision would accord equal treatment to cash and stock dividends in the situation described, as well as continue existing law that cash dividends that are declared and payable after death are part of the specific devise. While it would expand §737.605 of the new Principal and Income Provisions by including distributions of securities in the specific devise (which are considered principal under §737.606(1) and therefore not payable under §737.605(2)(a)), this would conform to the general intent of §732.605. Certainly it would eliminate a likely source of litigation.

198. See note 197 *supra* for suggested amendments.

199. O'Connell & Effland, *supra* note 31, at 254; Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost,* 2 TEXAS TECH. L. REV. 195, 201 (1971).

200. T. ATKINSON, *supra* note 12, at 742.

tinction, the intention of the testator is not considered relevant.[201] In Florida, however, this intent is quite relevant.[202] Perhaps to reduce the testator's (and legatee's) frustration caused by improper drafting, section 732.606 of the 1974 Code allows nonademption in certain cases where it is believed the testator would probably so intend.[203] Generally, these involve instances where an asset is involuntarily removed from the estate shortly before death, or where the testator has sold property and retained contract rights against the buyer. Although the section is somewhat misleading in its arrangement,[204] a specific devisee will be entitled to any property remaining in the specific devise, as well as any outstanding: (1) balance or security interest resulting from the sale of the property by the testator; (2) amount of a condemnation award unpaid at death; and (3) proceeds unpaid at death from fire or casualty insurance if the subject property has been lost or destroyed.[205] The devisee is also entitled to any "[p]roperty owned by the testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for the specifically devised obligation."[206] Finally, in order to protect the devisee in cases where the property had been held by a guardian and the testator was unable to change his will because of incompetency, the section allows the devisee to take a general pecuniary devise equal to the amount realized by a sale, condemnation, or *insured* casualty.[207] This seems to be merely a codification of Florida's existing case law in the case of insurance proceeds[208] and guardianship sales,[209] but

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201. *Id. See, e.g.,* Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270 (1912); Elwyn v. De Garmendia, 148 Md. 109, 128 A. 913 (1925); Welch v. Welch, 147 Miss. 728, 113 So. 197 (1927); Hill's Adm'rs v. Hill, 127 Va. 341, 103 S.E. 605 (1920).

202. Eisenchenk v. Fowler, 82 So. 2d 876 (Fla. 1955); *see In re* Estate of Sacks, 267 So. 2d 888 (3d D.C.A. Fla. 1972); Balzebre v. First Nat'l Bank, 222 So. 2d 49 (3d D.C.A. Fla. 1969); Forbes v. Burket, 181 So. 2d 682 (2d D.C.A. Fla. 1966).

203. O'Connell & Effland, *supra* note 31, at 254-55, suggests that a reason for this provision may be the desire to reduce the judicial search for intent.

204. FPC §732.606 (1974). A casual reading of the subdivisions might lead one to think that subsection (2) applies only to specifically devised property held by a guardian of the property of the testator. A more careful reading shows this is not the case and that subsection (2) applies to a specific devisee of *all* testators. By reversing the subsections this misapprehension could easily be avoided.

205. FPC §732.606(2) (1974).

206. *Id.*

207. FPC §732.606(1) (1974). The provision is not applicable if "subsequent to the sale, condemnation or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one (1) year." *Id.* Moreover, this right is reduced by any right the specific devisee has under subsection (2). These are enumerated in the text accompanying notes 203-206 *supra.*

208. *Cf. In re* Estate of Sacks, 267 So. 2d 888 (3d D.C.A. Fla. 1972) (devisee entitled to insurance proceeds; the will had also devised all policies of insurance in the specifically devised property). Other jurisdictions have reached conflicting results in the *Sacks* situation. *Compare In re* Estate of McDonald, 133 Cal. App. 2d 43, 283 P.2d 271 (Dist. Ct. App. 1955) (devisee entitled to insurance proceeds, although policies were not included in the devise), *with In re* Barry's Estate, 208 Okla. 8, 252 P.2d 437 (1952) (specific legatee entitled only to automobile in its damaged state).

209. Forbes v. Burket, 181 So. 2d 682 (2d D.C.A. Fla. 1966) (specific devisee entitled to an amount equal to the proceeds of the sale by guardian).

giving the devisee the unpaid balance or security interest resulting from the sale of property by the testator is a complete change in Florida law.[210] The effects of condemnation or foreclosures of the property specifically devised have not been considered in Florida and consequently their coverage by the statute resolves some uncertainty.

Other Rules of Construction

Several other rules of construction may be briefly mentioned.[211] One that encompasses two rules simply provides that "[a] will is construed to pass all property that the testator owns at his death including property acquired after the execution of the will."[212] By using this language, the section adopts a presumption against partial intestacy and allows a will to pass after-acquired property, absent a contrary intent.[213] Another section codifies current case law by requiring a specific reference or other indication of intent in a will before a power of appointment is considered exercised in a general residuary clause.[214] It has been suggested that because the testator is unlikely to view the property subject to the power as his, this requirement probably reflects the typical belief that a general will clause does not exercise a power of appointment.[215] Whether this is true or not, the provision seems desirable because powers of appointment are regularly used in marital deduction clauses where the donor of the power does not wish the power to be inadvertently exercised.

Another UPC provision intended to simplify the interpretation of wills containing class gift terminology has been modified by the 1974 Code. The UPC allows half-bloods, adopted persons, and persons born out of wedlock to be included in a class gift in accordance with the intestacy rules for determining relationships.[216] The Florida Code omits half-bloods from the section,[217] possibly because the problem is unlikely to arise in class gifts, or because if it does arise, giving the half-blood only one-half of the share of the whole

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210. Eisenschenk v. Fowler, 82 So. 2d 876 (Fla. 1955) (mortgaged sale of specifically devised property to devisees resulted in a total ademption).

211. Two sections that are also included in part VI of chapter 732 are considered later. Section 732.601, governing simultaneous death, is equally applicable to intestacy and is therefore discussed in the text accompanying notes 316-322 *infra*. Discussion of the section on ademption by satisfaction (FPC §732.609) is postponed to allow comparison with the corresponding intestacy provision on advancements. See text accompanying notes 323-337 *infra*.

212. FPC §732.602 (1974); *see* UPC §2-604. A similar provision concerning after-acquired property is currently found in FLA. STAT. §731.05(2) (1973), although it applies only to wills containing a residuary clause.

213. That this is merely a rule of construction and subject to change by the testator is discussed in the text accompanying notes 181-183 *supra*.

214. FPC §732.607 (1974). This provision continues the result reached in DePass v. Kansas Masonic Home, 132 Fla. 455, 181 So. 410 (1938).

215. O'Connell & Effland, *supra* note 31, at 256.

216. UPC §2-611.

217. FPC §732.608 (1974). The section also omits the final clause of the UPC to conform to the changes made in §732.108, governing inheritance by illegitimates.

blood[218] would be unlikely to reflect the intent of the maker of the class gift. Assuming that the problems surrounding the intestacy provisions for adopted children and illegitimates are resolved,[219] the section should greatly reduce the possibility of litigation in the area.[220]

A final rule states that "[u]nless the will provides otherwise, all devises shall pass per stirpes."[221] The provision is not found in the UPC and is new to Florida law. It seems to be designed to promote the Florida policy of per stirpes distribution[222] by applying it to testamentary dispositions that are unclear on the matter.

Limitations on Testation and Succession

Most states impose some restrictions on the freedom of testation and on intestate succession in order to protect the surviving spouse and minor children, or, in extreme cases, to bar unworthy heirs.[223] The protective restrictions take the form of rights to homestead, certain exempt property and a family allowance, a right to avoid certain charitable gifts, and, in the case of the surviving spouse, the right to elect to take a share of the estate variously referred to as "dower," "curtesy," "the statutory share," or "the elective share." Further restrictions on the freedom of testation may result from contracts made during the decedent's lifetime, and more recently, a statutory rejection of the effectiveness of *in terrorem* clauses. All of these restrictions appear in the 1974 Code, but are scattered through various parts of chapter 732.

Homestead, Exempt Property, and Family Allowance

With one exception, the 1974 Code follows the UPC's enunciation of "certain rights and values to which a surviving spouse and certain children of a deceased *domiciliary* are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will."[224] Three distinct concepts are used to provide this protection: (1) homestead; (2) exempt property; and (3) a family allowance. Because of a constitutional mandate,[225] the Code rejects a UPC recommendation for a set dollar amount for the homestead allowance.[226] Instead, an existing statute is continued that provides:

218. The section provides that the enumerated persons are included in a class gift "in accordance with rules for determining relationships for purposes of intestate succession." The intestacy provision provides "the half-blood shall inherit only half as much as those of the whole blood . . . ." FPC §732.105 (1974). By avoiding this result, the section continues the common law rule in Florida. Lowrimore v. First Sav. & Trust Co., 102 Fla. 740, 140 So. 887 (1931) (division among next of kin included nephews and nieces of the whole- and half-blood).

219. FPC §732.108 (1974). See text accompanying notes 73-87 *supra*.

220. O'Connell & Effland, *supra* note 31, at 257.

221. FPC §732.610 (1974).

222. See text accompanying note 42 *supra*.

223. T. Atkinson, *supra* note 12, at 100.

224. UPC art. 2, pt. 4, General Comment (emphasis in original).

225. Fla. Const. art. X, §4.

226. UPC §2-401. This was proposed in order to increase the use of the summary administration procedures of the UPC. UPC §2-401, Comment.

> The homestead shall descend as other property but if the decedent is survived by a spouse and *lineal descendants,* the surviving spouse shall take a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of death of the decedent.[227]

Because the class of lineal descendants is substantially different from the narrower constitutional class of minor children, the statute may well be ruled an invalid extension of the Florida constitution. This was the result in the recent decision of *In re Estate of McGinty,*[228] which involved the similar statute concerning devise of homestead.[229] That provision has been changed by the 1974 Code to conform to the *McGinty* decision.[230] A similar modification should be made in this provision to change the class to surviving spouse and minor children.

In addition to homestead, the surviving spouse of a deceased domiciliary is also entitled to certain exempt property over and above any benefit passing under the will (unless it otherwise provides), or by intestate succession or elective share.[231] A modification of the UPC, the provision allows the surviving spouse, or if there is no spouse, the minor children sharing jointly, to receive $5,000 of household furnishings and appliances, subject to any perfected security interest, and $1,000 of personal effects.[232] The right to personal effects may be negated by a specific devise in a will, but otherwise the rights have priority over all claims against the estate.[233] In combination, these will gen-

227. FPC §732.401 (1974) (emphasis added). *See* FLA. STAT. §731.27 (1973).

228. 258 So. 2d 450 (Fla. 1972) (devise of residence to one of four daughters held valid). This was confirmed in *In re* Estate of McCartney, 299 So. 2d 5 (Fla. 1974) (devise of residence to spouse held valid when only adult children survived).

229. FLA. STAT. §731.051(1) (1973).

230. FPC §732.516 (1974) restricts devise of the homestead if the decedent is survived by a spouse or *minor children.* The current statute's purported restriction on devises of homestead if a decedent was survived by a spouse or lineal descendent was invalidated in two recent supreme court decisions. See note 228 and accompanying text *supra.*

231. FPC §732.402 (1974). There is a problem of clarity with respect to the provision "unless . . . [the will] otherwise provides," for it is uncertain if a residuary gift will satisfy this limitation, at least with respect to the $5,000 allowance. The $1,000 of personal property may be avoided only by a specific devise in the will, but there is no similar language concerning the $5,000 worth of household furniture, furnishings, and appliances.

232. *Id.* See UPC §2-402. The UPC lumps household furnishings, et cetera, with personal effects into a single dollar value, then provides: "If there is no surviving spouse, children of the decedent are entitled jointly to the same value." This sentence is included in the 1974 Code with the limitation that only *minor* children are entitled to share. Because it provides separate values for household furnishings and for personal effects, "value" should be changed to "values" to avoid any contention that minor children are entitled only to the personal effects.

The elimination of "automobile" from exempt property may prove inconvenient to the survivors and detrimental in small estates where the value of household furnishings, et cetera, may be considerably less than $5,000.

233. *Id.* There is no similar limitation on household furnishings and appliances. It would seem to have the result that a testator may not dispose of the first $5,000 of these goods if survived by a spouse and minor children. The last sentence of the section, however, may allow him to force the surviving spouse and children to elect between the furnishings he wishes to give others and the other provisions in the will made for the spouse and minor children.

erally result in a greater amount than under current law.[234] In view of *McGinty*, however, the question arises whether the increases are valid, because the exemption for personal property is limited to $1,000 by the constitution.[235]

In a final attempt to provide for the decedent's family, the Code adopts another modified UPC provision providing an allowance for the family's maintenance during the administration of the estate.[236] As with exempt property, the family allowance is not chargeable against any other benefit to which the family is entitled, unless the will otherwise provides, and in keeping with its concept of support, the death of any person entitled to the allowance terminates the right to any unpaid amount.[237]

This provision considerably enlarges the benefits provided by present law,[238] for the maximum amount allowed is increased from $1,200 to $6,000,[239] is not conditioned upon necessity, and is not limited to one year's support. It is narrower than the UPC, however, for it may only be paid by court order, after notice and a hearing,[240] and is only given fourth priority in order of payment.[241] Combined with the spouse's increased intestate share[242] and the increased amount of exempt property,[243] the net effect of this increase on intestate estates is considerable. Under current law, children share equally with the wife in the net estate above $2,200.[244] Under the 1974 Code, however, an estate of up to $32,000 could go entirely to the surviving spouse without the

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234. Currently, §731.36 allows the surviving spouse of an *intestate* to "retain all wearing apparel and such household goods and farming utensils, provisions and clothing as may be necessary for the maintenance of the surviving spouse and that of the family." Under the Florida constitution, however, this is limited to $1,000. FLA. CONST. art. X, §4.

235. FLA. CONST. art. X, §4.

236. FPC §732.403 (1974). Those entitled to the allowance are the "surviving spouse and minor children whom the decedent was obligated to support and other children who were in fact being supported by him." *Id.*

237. *Id.* The provision may cause an adjustment in the amount allowed by the court and the person to whom it is paid if the spouse dies during administration of the decedent's estate, because the allowance is to be "paid to the surviving spouse, if living, for the use of the spouse and dependent children." *Id.*

238. *Compare* FPC §732.403 (1974), *with* FLA. STAT. §§733.20(1)(d), (j) (1973). In certain instances, the current statute allows payment of a supplemental family allowance not exceeding $3,000. FLA. STAT. §733.20(1)(i) (1973).

239. The comparative UPC provisions, §2-403, had no limitations. In a companion provision not adopted by the Code, however, the personal representative was authorized to provide a family allowance without court approval in an amount not to exceed the same $6,000 amount adopted by the Code. UPC §2-404.

240. FPC §732.403 (1974). See note 239 *supra*.

241. *Id.* The allowance is deferred to costs of administration, funeral expenses, and expenses of the last illness, whereas the UPC gives it priority over all "claims," which are defined in §1-201 to include funeral expenses and expenses of administration. UPC §2-403.

242. This will generally allow the spouse to take the first $20,000 of the estate, plus one-half of the remainder, FPC §732.102 (1974). See text accompanying notes 45-55 *supra*.

243. FPC §732.402 provides for up to $6,000 in exempt property. See text accompanying notes 232-235 *supra*.

244. This is the total of the $1,000 of exempt property allowed under the constitution, and the $1,200 family allowance provided by §733.20(1)(d). Unless the supplemental family allowance of $3,000 is involved, FLA. STAT. §733.20(1)(i), the spouse and children then take equal shares under §731.23.

children sharing at all. This increase apparently more adequately reflects the desire of the average intestate.[245]

Elective Share of Surviving Spouse

At common law, the desire to protect the surviving spouse was expressed solely by the correlative doctrines of dower and curtesy.[246] This effectively limited testamentary freedom in a land-based economy, but as the focus of the economy shifted to an industrial society with personal and intangible property as a source of wealth, it became apparent that the doctrines of dower and curtesy were no longer adequate protection for the surviving spouse.[247] Non-community property jurisdictions soon supplemented or supplanted the doctrines with an elective statutory share in both real and personal property, occasionally still termed "dower,"[248] that was available only to the widow.[249] Additionally, as previously discussed, the devise of homestead was restricted and provisions were made for limited support of the family that could not be defeated by the will or by ordinary creditors.[250]

Apparently concerned because the statutory share of the surviving spouse could be defeated by use of various ownership arrangements for avoiding probate,[251] the drafters of the UPC adopted the unique concept of an elective share based on both probate and nonprobate transfers.[252] Simply stated, this "augmented estate" is the net probate estate increased by certain inter vivos transfers made during the marriage and reduced by the property that the decedent had previously given the surviving spouse.[253] As its authors themselves acknowledge, the elective share system is both controversial and complex.[254] Whether because of these problems or because it is a solution to a problem of only slight incidence,[255] the 1974 Code rejected parts of the UPC

245. In the will studies, most decedents with estates of less than $50,000 left the entire estate to the surviving spouse. See text accompanying notes 27-32 *supra.*

246. O'Connell & Effland, *supra* note 31, at 228. As developed, these doctrines gave only the surviving spouse certain rights in realty but these could not be avoided by testamentary disposition. *Id.*

247. *Id.* Obviously, if the bulk of wealth were represented by intangible personal property and currency, limitations on the devise of realty were no longer sufficient.

248. See FLA. STAT. §731.34 (1973).

249. O'Connell & Effland, *supra* note 31, at 228. In these commentators' views, this reflected "not so much the male attitude that only the woman requires protection, but rather the economic reality that most family wealth was acquired and owned by the husband." *Id.*

250. *Id.* See text accompanying notes 232-235 *supra.*

251. UPC §2-202, Comment. For detailed discussion of these arrangements and the difficulties faced by a widow attempting to reach the nonprobate assets, see O'Connell & Effland, *supra* note 31, at 229.

252. UPC art. 2, pt. 2.

253. UPC §2-202 and Comment. For a fuller explanation and criticism, see Clark, *The Recapture of Testamentary Substitutes To Preserve the Spouse's Elective Share; An Appraisal of Recent Statutory Reforms,* 2 CONN. L. REV. 513 (1970).

254. UPC art. 2, pt. 2, General Comment.

255. *See* Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem,* 33 U. CHI. L. REV. 681 (1966). The only real benefit of the UPC plan occurred when the decedent was antagonistic or the survivor grasping, that is, where the decedent tried to dis-

plan, inserting in its stead an arrangement of elective share provisions that are founded in both the UPC and existing statutes, but that differ substantially from current Florida law. The new law allows a surviving spouse to elect to take a one-third share of the "net distributable estate," which is defined as "the assets of the estate after payment of taxes, claims, family allowance, exempt property and expenses of administration."[256] As under existing law, the surviving spouse is entitled to homestead, exempt property, and family allowance in addition to the elective share.[257] The deduction of the claims, family allowance, exempt property, and administration expenses *before* the share is computed,[258] however, is contrary to current Florida law,[259] and will greatly reduce the attractiveness of an election in testate estates. Moreover, when compared with the spouse's increased intestate share[260] the concept of an election against a net, rather than gross, estate should eliminate the election in intestate estates.

Another change is that the new provision also computes the one-third share after the payment of taxes,[261] in effect requiring the electing spouse to pay one-third of the taxes on the estate. This seems to conflict, however, with the last sentence of the section that states: "Nothing in this section shall require the spouse to contribute to estate or inheritance taxes if contribution would not be required by §733.817."[262] Section 733.817(2)(c) exempts from such contribution any property qualifying for the marital deduction. As the statutory share would generally fully qualify, the provision unnecessarily poses an accountant's nightmare. The elective share is based on the "net distributable estate," which cannot be computed until taxes are paid. Due to the marital deduction, however, the tax liability cannot be computed until the net amount to be received by the spouse is known.[263] This is an unnecessary complication, for the statutory share could always qualify for the marital deduction,[264] and

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inherit the spouse or the spouse tried to get a larger portion by claiming dower after receiving large amounts of the estate by inter vivos transfer.

256. FPC §732.201 (1974).

257. *Id. See* FLA. STAT. §§731.34, .36 (1973). In addition, the provision concerning preexisting inchoate dower in transferred realty remains the same. *Compare* FPC §732.203 (1974), *with* FLA. STAT. §§731.35(4), (5) (1973).

258. FPC §732.201 (1974).

259. FLA. STAT. §731.34 (1973). The section provides *inter alia* that "in all cases the widow's dower shall be free from liability for all debts of the decedent [other than secured interests] and all costs, charges, and expenses of administration." It does provide, however, that homestead is not included in the property subject to dower. *Id.*

260. See text accompanying notes 45-55 *supra.*

261. FPC §732.201 (1974).

262. *Id.* Currently, FLA. STAT. §731.34 (1973), requires contribution by the widow only when the election has the effect of increasing the estate tax.

263. *See* INT. REV. CODE OF 1954, §2056(b)(4).

264. If the spouse had received assets from outside the probate estate (insurance, et cetera), which, when combined with the statutory share would exceed 50% of the adjusted gross estate for tax purposes, the amount that exceeded this limit would not qualify for the marital deduction because of §2056(c). Whether the amount qualifying for the deduction included the statutory share or whether it was considered part of the amount that exceeded the limitation would make no difference under the apportionment statute, for the nondeductible amount would be subject to contribution under §733.817(1)(e). Therefore, the

therefore be exempted from contribution to the estate tax by the apportionment statute.[265] Therefore, the statute should be amended to delete the required deduction of taxes from the definition of net distributable estate.

If the surviving spouse decides to elect this reduced share, the 1974 Code follows the UPC by making it explicit that the right of election may be exercised only during the spouse's lifetime.[266] The usual time for election is reduced from seven to five months after first publication of notice to creditors, unless litigation occurs.[267] In such a case, the time for election is extended and may be made within 40 days after the litigation is determined — a reduction from the existing 70 days.[268]

Except for the rejection of the augmented estate and its related provisions, most of the 1974 Code's elective share provisions follow the UPC. There are, however, two interesting omissions. A provision that allowed the court to extend the time of election if cause was shown was not adopted,[269] apparently because of a feeling that the occurrence of litigation was the only cause that should justify an extension.[270] There is less justification, however, for the omission of a provision allowing the surviving spouse to withdraw an election. Because the UPC requires the withdrawal to be made "before entry of a final adjudication by the Court,"[271] its adoption by the Code would seem to add desirable flexibility to the elective share provisions.[272]

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statutory share could always be considered to be part of the amount qualifying for the deduction, since in most instances the 50% limitation would not be reached if the spouse were claiming a statutory one-third interest in the net estate.

265. FPC §733.817(2)(c) (1974).

266. FPC §732.202(1) (1974). *See* UPC §2-203. Existing law only requires the election to be made in writing and signed by the widow. FLA. STAT. §731.35 (1973).

The new section follows both the UPC and the current statute by allowing an incompetent spouse's guardian to make the election subject to court order. FPC §732.202(3) (1974). The UPC requires a finding that exercise is necessary to provide adequate support, while the 1974 Code follows existing law allowing the order to be issued if "the best interest of the surviving spouse may require." *Id. See* UPC §2-203; FLA. STAT. §731.35(3) (1973).

267. *Compare* FPC §732.202(1) (1974), *with* FLA. STAT. §731.35(1) (1973). This is one month shorter than allowed by UPC §2-205, but still allows one month after the expiration of the shortened nonclaim period. FPC §733.701 (1974).

268. *Compare* FPC §732.202(2) (1974), *with* FLA. STAT. §731.35(2) (1973). As under existing law, once the election is filed, notice and a hearing are required before the court may determine the amount of the elective share and order its payment. *Compare* FPC §732.204 (1974), *with* FLA. STAT. §§733.10-.11 (1973).

269. UPC §2-205(a).

270. This is the only situation where the statute allows an extension. FPC §732.202(2) (1974).

271. UPC §2-205(c).

272. There are several instances in which it may be desirable to withdraw an election. First, there could have been a misconception of the amount to be received if no election were made. *See* Smith v. First Nat'l Bank, 124 N.E.2d 851 (Ohio App. 1954) (revocation allowed where widow was unaware that taking under the will would result in an additional $11,000). More importantly, it is probable that litigation either to determine the beneficiaries or construe the will (which under §733.211, may not be filed until the will is probated) will not be filed within five months of the notice to creditors — the usual time in which the election must be made. Since the section did not adopt the UPC provision allowing the court to extend this time limit if cause was shown, see note 49 *supra* and accompanying text,

Waiver of Surviving Spouse's Rights in the Estate

Prenuptial and separation agreements are covered by a new section that is a modified version of the UPC.[273] It provides that all rights to an elective share, homestead, exempt property, and family allowance[274] may be waived, wholly or partially, by a writing signed by the waiving party and that no consideration other than the execution of the agreement is necessary for its validity.[275] The statute seems to be in accord with Florida case law in requiring "full disclosure" to the waiving party in the case of a postnuptial agreement; however, current law is considerably relaxed by the provision that "[n]o disclosure shall be required for an agreement . . . executed before marriage."[276]

The UPC draftsmen seem to contemplate the use of the prenuptial agreement only in second or later marriages,[277] but neither the UPC nor the 1974 Code provisions so limit its use. If used in first marriages or even subsequent marriages where minor children may be expected to survive the decedent, the agreement may complicate the setting aside of homestead, exempt property, and the family allowance because the statutes are far from clear about what should be done in such circumstances. Presumably because of the waiver, the spouse would be treated as nonexistent for these purposes.[278] If so, a fee simple title to the homestead would vest immediately in the minor children and also the ownership of the exempt property. Nevertheless, it would seem that the court should direct payment of the family allowance to the surviving spouse

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it would be desirable for the spouse to have the opportunity to withdraw an election made within the five-month period if the result of the litigation would enable her to receive a greater amount under the will.

273. *Compare* FPC §732.702 (1974), *with* UPC §2-204.

274. FPC §732.702(1) (1974). These rights are discussed in the text accompanying notes 224-272 *supra.*

275. FPC §732.702(3) (1974).

276. FPC §732.702(2) (1974). The UPC provision requires only "fair disclosure" in either circumstance. UPC §2-204. The adoption of full disclosure for separation or postnuptial agreements conforms with existing case law that such agreements are valid only if they were freely and voluntarily entered into, with competent advice and with full knowledge of the interest in the estate and its approximate worth. *E.g.,* Horney v. Rhae, 152 Fla. 817, 12 So. 2d 302 (1943); Weeks v. Weeks, 143 Fla. 686, 197 So. 393 (1940); Tavel v. Guerin, 119 Fla. 624, 160 So. 665 (1935).

Prior to the Code, the prenuptial agreement had to meet one of three requirements: (1) fair and reasonable in light of the rights being waived; (2) based on full and frank disclosure; or (3) absent such disclosure, based on a general and approximate knowledge of the perspective spouse's property. *E.g.,* DelVecchio v. DelVecchio, 143 So. 2d 17 (Fla. 1962); Reese v. Reese, 212 So. 2d 33 (3d D.C.A. Fla. 1968); Cantor v. Palmer, 166 So. 2d 466 (3d D.C.A. Fla. 1964).

277. UPC §2-204, Comment states: "The provisions . . . seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse."

278. Conceivably it could be held that, because there is a surviving spouse, the condition precedent to the right of minor children to claim the exempt property and family allowance has not occurred, and, therefore, no one can claim these benefits against creditors or testamentary beneficiaries.

as the person having care and custody of the minor children.[279] If this analysis is correct, the waiver of the family allowance is largely illusory if minor or dependent children survive the decedent.

Charitable Devises

Under the current version of the mortmain statute, most charitable devises must be made by a will executed more than six months prior to death in order to avoid possible invalidty.[280] The 1974 Code has made several changes in this statute,[281] one of which poses an unnecessary problem. As amended, the statute is now applicable only when the decedent leaves lineal descendants or a spouse; the words "adopted child" in the present statute have been deleted.[282] This deletion seems of doubtful propriety and is likely to cause litigation. Presumably it was thought to be redundant, but the section does not deal with the question of intestate succession (covered by section 732.108) or of class gifts (covered by section 732.608) and the omission here might prevent an adopted child from taking advantage of the provisions of this section. Another important change is the omission of the final section of the existing statute, which has made it inapplicable to gifts to institutions of higher learning.[283] The new provision also shortens the period for filing notice from six to four months, consistent with the shortening of the nonclaim period and the period in which challenges can be made to the validity of the will.[284] Finally, it avoids the unfortunate results of the *Blankenship* case[285] by making the section in-

279. "Otherwise it [the family allowance] shall be paid to the children or the person having their care and custody." FPC §732.403 (1974).

280. FLA. STAT. §731.19 (1973).

281. FPC §732.803 (1974). Essentially, the statute provides that the lineal descendants of the surviving spouse of a testator may avoid any charitable or religious devises, if the will was executed within six months of death and they file notice of this fact within four months after death. The section is not applicable if an earlier will, executed more than six months prior to death, contained a devise substantially similar in amount or if a codicil that did not substantially change such devise was executed within six months of death.

282. *Compare* FPC §732.803 (1974), *with* FLA. STAT. §731.19 (1973).

283. FLA. STAT. §731.19 (1973). Presumably such gifts were originally accepted because it was thought that their representatives were unlikely to be in a position to unduly influence a testator during the latter months of his life. Perhaps this reason is believed to be no longer applicable because (a) fund raising drives are more frequent and better organized today, or (b) that attorneys interested in institutions of higher learning are increasingly recommending such institutions as objects of their clients' bounty.

284. See text accompanying notes - *infra* (part II).

285. *In re* Blankenship's Estate, 122 So. 2d 466 (Fla. 1960). The testatrix had executed four wills, two of which were executed within six months of death. Despite the fact that all four wills contained substantially the same charitable and scientific bequests, the Florida supreme court held the gifts invalid. Applying §731.19, the court found two requirements necessary before the gifts could be saved: "(1) The testator must have expressed substantially the same bequest in a will executed *immediately next prior* to his last will, *i.e.*, in the *next to the last* will made by him, and (2) the next to the last will must have been executed at least six months before the testator's death." *Id.* at 468 (emphasis in original). Because the "next to last will" had not been executed before the six-month period, the court held the saving clause inapplicable, even though the two earlier wills had contained substantially similar bequests and had been executed more than six months prior to death.

applicable if the testator made a valid charitable devise in substantially the same amount for the same purpose or to the same beneficiary in an earlier will or *series of wills,* one of which is executed more than six months prior to death.[286]

Unworthy Heirs

Generally, the worthiness of a successor is not considered and a claimant is not barred by his misconduct toward the decedent.[287] In many jurisdictions, however, claimants are prevented from sharing in an estate in three situations.[288] The first occurs where there has been a violation of marital obligations toward the decedent; Florida case law follows this result in extreme situations.[289] The other two situations are covered by statute. Thus, denial of paternity prevents any claim under the intestacy provisions,[290] and a convicted murderer of the decedent s not entitled to inherit or take any devise from the decedent's estate.[291] This treatment has been continued in the 1974 Code,[292] despite several weaknesses in the latter provision.

Both the present statute and the new provision require conviction of murder as a condition precedent to being barred.[293] Neither provision, however, defines the term "murder." Instead, the definition is left to the general criminal law, which holds that manslaughter is not murder but a degree of unlawful homicide.[294] As a result, in a plea bargaining situation, a plea of guilty to manslaughter would render the statute inapplicable, allowing the party to "profit" from his felonious act.

This result would be avoided by the broader and more satisfactory provision of the UPC, which applies to claimants who "feloniously and intentionally . . . [kill] the decedent."[295] The UPC provision was apparently rejected because conviction was not necessary for its application.[296] Additionally, the UPC provision specifically covers the effect of such homicide on property

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286. FPC §732.803 (1974).

287. T. ATKINSON, *supra* note 12, at 147.

288. *Id.* at 147-48.

289. Initially, Florida courts avoided the problem. Henderson v. Chaires, 25 Fla. 26, 6 So. 164 (1889). More recently, they have held that a spouse guilty of abandonment, desertion, or bigamy is estopped from sharing in the estate. Doherty v. Traxler, 66 So. 2d 274 (Fla. 1952); Nedd v. Starry, 142 So. 2d 522 (1st D.C.A. Fla. 1962). However, nonpayment of support where the parties were separated, but not divorced, does not bar the survivor's claim. Kreisel v. Ingham, 113 So. 2d 205 (2d D.C.A. Fla. 1959).

290. FLA. STAT. §731.29 (1973). This is continued by the 1974 Code in §732.108. See text accompanying notes 87-96 *supra.*

291. FLA. STAT. §731.31 (1973).

292. FPC §§732.108, .802 (1974).

293. FPC §732.802 (1974); FLA. STAT. §731.31 (1973).

294. *See, e.g.,* Andrews v. State, 99 Fla. 1350, 126 So. 751 (1930); Folks v. State, 85 Fla. 238, 95 So. 619 (1923).

295. UPC §2-803.

296. *Id.* While a conviction is deemed conclusive, the UPC allows the court to determine by a preponderance of evidence whether the killing was felonious and intentional for the purposes of the section. UPC §2-803(e).

appointed to the killer, joint assets, life insurance, and other beneficiary designations and "any other acquisition of property or interest by the killer."[297] While some of these situations have been considered by existing case law,[298] it would seem desirable to assure uniform treatment in all of them. Therefore, the UPC provision should be adopted, changing it, if necessary, to limit its application to a conviction for murder.[299]

Limitations by Contract

A person may limit his freedom of testation by a contract made during his lifetime.[300] This has proved a fertile area for litigation, both in Florida and elsewhere, concerning the existence, form, and terms of the contract, as well as the remedies available for breach.[301] In an effort to reduce such litigation, a statute was passed in 1959 making such agreements unenforceable unless in writing and signed in the presence of two subscribing witnesses.[302] This requirement is continued in the 1974 Code,[303] along with a codification of existing case law that the execution of joint or mutual wills does not create a presumption of a contract not to revoke the will or wills.[304]

The language of the latter subdivision is taken from the UPC.[305] It seems unfortunate that an earlier phrase of the UPC "or contract to die intestate"[306] was not also added to subsection (1). As the section now reads it seems that an agreement *not* to make a will may be enforceable even though it is oral or evidenced by a writing not signed or witnessed.

297. UPC §2-803(d). The other situations are covered in subsections (a)-(c).

298. *See, e.g.*, Carter v. Carter, 88 So. 2d 153 (Fla. 1956) (statute not applicable to insurance proceeds, but applying common law principle to deny their receipt by a beneficiary who unlawfully and intentionally killed the decedent); Hamilton v. Liberty Nat'l Life Ins. Co., 207 So. 2d 472 (2d D.C.A. Fla. 1968) (same); Ashwood v. Patterson, 49 So. 2d 848 (Fla. 1951) (statute not applicable to jointly held property, but holding that a murderer can acquire only a proportionate interest in the property).

299. Atkinson criticizes such a requirement, observing that the murderer's suicide before conviction entitles his estate or heirs to the property. T. ATKINSON, *supra* note 12, at 155. While the same result would of course follow the murderer's death for any other reason, the lineal descendents would be able to take the murderer's share even upon conviction through the operation of the anti-lapse statute. Therefore, an elimination of the conviction requirement would have a different result only when the murderer left a surviving spouse, but no lineal descendants, or when conviction was avoided due to a legal technicality.

300. McDowell v. Ritter, 153 Fla. 50, 13 So. 2d 612 (1943).

301. *See generally* T. ATKINSON, *supra* note 12, at 210-27. Florida cases are collected in 34 FLA. JUR. 478-87 (1961).

302. FLA. STAT. §731.051 (1973). The statute applies only to contracts made after 1957. FLA. STAT. §731.051(2) (1973). Therefore, specific performance is available for oral contracts made prior to that time. Hagan v. Laragione, 205 So. 2d 289 (Fla. 1967); Keith v. Culp, 111 So. 2d 278 (1st D.C.A. Fla. 1959). The 1974 Code drops this requirement and therefore may be considered to apply to all such contracts.

303. FPC §732.701(1) (1974).

304. *Id.* This is the rule expressed in Keith v. Culp, 111 So. 2d 278 (1st D.C.A. Fla. 1959); Hayes v. Jones, 122 Fla. 67, 164 So. 841 (Fla. 1935). *But see* Laragione v. Hagen, 195 So. 2d 246 (2d D.C.A. Fla. 1967), *rev'd on other grounds*, 205 So. 2d 289 (Fla. 1968) (stating that "the execution of mutually reciprocal wills is strong confirmatory proof that an agreement for their execution was entered into").

305. UPC §2-701.

306. *Id.*

"In Terrorem" Clauses

Another new provision taken from the UPC may be considered a limitation on the freedom of testation, for it makes unenforceable any clause in a will purporting to penalize will contests.[307] The UPC, however, limits the unenforceable nature of the clause to instances when "probable cause exists for instituting proceedings."[308] The omission of this phrase by the 1974 Code is perhaps undesirable; certainly it is a change of existing case law.[309] While this provision eliminates litigation about what constitutes "probable cause," it may have the effect of encouraging a disappointed beneficiary to use a will contest (or the threat thereof) to establish a bargaining position.

Other Provisions Concerning Wills and Succession

In addition to the provisions limiting testation and succession, a number of provisions scattered through the 1974 Code affect both wills and intestacy. Several can best be discussed by comparison.

Existence of the Beneficiary

To share in an intestate estate an heir must be in existence at the death of the decedent. In a testate estate, existence of the devisee is required either at the testator's death or at some other relevant time specified in the will. Whether these conditions are satisfied may be in doubt if the beneficiary is born within nine months after the decedent's death or if he dies under such circumstances that it cannot be determined readily whether he or the decedent died first.

Prior to the 1974 Code the problem of the afterborn heir was dealt with in Florida by applying the general property rule that a child *en ventre sa mere,* if subsequently born alive, is considered in being from the time of conception for purposes beneficial to it.[310] No Florida case has been found applying the rule to a testamentary disposition but as a common law rule it is fully applicable[311] and has been so applied in other states.[312]

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307. FPC §732.517 (1974).

308. UPC §3-905.

309. The general rule in Florida is that an *in terrorem* clause will not be enforced against a legatee who files a bill for the construction of a will or who contests it *in good faith* for probable cause, unless there is a limitation over of the estate to another person. Wells v. Menn, 158 Fla. 228, 28 So. 2d 881 (1946); Kolb v. Levy, 110 So. 2d 25 (3d D.C.A. Fla. 1959).

310. *See* Shone v. Bellmore, 75 Fla. 515, 78 So. 605 (1918) (involving a child of the decedent). *Cf.* Spokes v. Liberty Mut. Ins. Co., 213 So. 2d 695, 700 (Fla. 1968) (citing *Shone* and stating that the property rights of an unborn child are contingent upon its being born alive).

311. Blackstone says: "An infant *in ventre sa mere,* or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy . . . and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born." 1 Blackstone, Commentaries *130.

312. See cases cited 4 W. Bowe & D. Parker: Page on the Law of Wills §34.14 n.4 (1961).

The UPC elected to codify the common law rule as to heirs by providing that afterborn relatives of the decedent that were conceived prior to his death inherit as if they had been born in his lifetime.[313] No similar provision as to afterborn beneficiaries of a will is included in the UPC, the draftsmen presumably preferring to rely upon the general property rule in the more varied fact situations possible under a will. The 1974 Code modifies the UPC provision, however, by restricting the rule to "issue" of the intestate rather than to all relatives.[314] Possibly this was done to reduce the evidentiary problems attendant to proving that a relative other than "issue" had been conceived prior to the death of the decedent. If so, it is an unneeded restriction. Whether the afterborn child is a lineal descendant or not, it will be necessary to prove that the child's parent predeceased the decedent in order to prevent such parent from inheriting.[315] This proof coupled with a birth certificate showing birth within the normal period of gestation after the parent's death is no more than is required in the case of "issue." Even if the concern is possible illegitimacy, this fear seems no basis for distinguishing between issue and collateral relations.

The envisioned evidentiary problems that are nonexistent in intestacy may be present in testamentary dispositions because gifts may be made to children of a living person. What effect the modification of the *en ventre* rule in the case of intestate successors will have on the application of the rule to testamentary beneficiaries is uncertain. By its terms, the statute is clearly inapplicable, but it seems difficult to justify a different treatment of collateral relatives who take by intestacy and those taking under will provisions. For these reasons it would seem desirable to reinstate the word "relative" in the section.

The 1974 Code does cover both the intestate and the testate situation in its treatment of the problem of determining survivorship when the heir or testamentary beneficiary and the decedent die under such circumstances that it cannot be determined readily which survived. Unfortunately, however, it represents a rejection of the more modern and practical view of the UPC in favor of simply an edited version of the current simultaneous death provisions.[316] Thus, relief from the increased cost of two administrations of the property of the first to die in a common accident situation remains available only when "there is insufficient evidence that the persons have died otherwise

313. UPC §2-108.

314. FPC §732.106 (1974). Thus. only lineal descendants, and not collateral relatives, would fit under this provision.

315. All the new section provides is that the afterborn issue of the decedent would "*inherit* as if they had been born in the lifetime of the decedent." FPC §732.106 (1974) (emphasis added). It does not necessarily make them heirs. If the afterborn child's parent is the mother, there could obviously be no evidentiary problem concerning the date of conception or birth, for the mother would have to die before the intestate in order for the child to be an heir (otherwise the mother would be the heir). In that case, of course, the child would not be afterborn at all. Even if the father were the parent, there would still be no problem. Again, the father would have to predecease the intestate in order for the child to be an heir. His date of death would place an outside limit on the date of conception, and as he had predeceased the intestate, that date would have to be before the intestate's death.

316. *Compare* FPC §732.601(1) (1974), *with* FLA. STAT. §736.05 (1973).

than simultaneously."[317] Florida courts, among others, have interpreted this requirement so strictly that the section has lost its effectiveness[318] and is greatly in need of revision.

The UPC solves this problem by requiring that any heir or devisee survive the decedent by 120 hours.[319] Admittedly this is an arbitrary period, but it would eliminate some of the more egregious cases of multiple administration. Nevertheless, this requirement was rejected by the draftsmen of our code—perhaps because of the arbitrary period, perhaps because it might delay slightly the administration of the estate, or possibly because it might eliminate a marital deduction should the surviving spouse not live for five days.[320] Only the last reason may have merit. Although any period of time is arbitrary, it is more likely to be readily susceptible to proof than is the test "insufficient evidence that the persons have died otherwise than simultaneously." Additionally, there seems to be no reason why administration could not be started within the five-day period if desirable. Ordinarily this is not done, and, in any event, haste should not be encouraged. Against the tax savings that might result from the availability of the marital deduction[321] should be weighed the additional

317. FPC §732.601 (1974).

318. Simultaneous death statutes were originally intended to resolve some of the difficulties that arose in determining the distribution of estates in common disaster situations. They were prompted by the common law rule that the length of survivorship of an heir over a decedent was immaterial. *See, e.g.*, Cone v. Benjamin, 157 Fla. 800, 27 So. 2d 90 (1946); Smith v. Croom, 7 Fla. 81 (1857) (survivorship in both cases was less than one hour). The policy underlying the enactment of these statutes—to avoid both the almost impossible task of proving who died first in common disaster situations, as well as the problems of two administrations of the property of the first to die—was well expressed in Miami Beach First Nat'l Bank v. Miami Beach First Nat'l Bank, 52 So. 2d 893 (Fla. 1951). Unfortunately, however, the statute was interpreted by the same court to be applicable only in split second survivorship situations. In other words, it was viewed as a means of simplifying evidentiary problems. Because the wording of this statute made it applicable only when "there is no sufficient evidence" that the parties died other than simultaneously, the problems of dual administrations in common disaster situations are seldom avoided. In Rimmer v. Tesla, 201 So. 2d 573 (1st D.C.A. Fla. 1967), the court held the statute inapplicable because "the medical proof adduced . . . is sufficient to establish that Mildred Rimmer survived her husband by a time interval of at least fifteen minutes, and that their deaths were not simultaneous." *Id.* at 577. This literal reading of the statute reached the heights of absurdity in a California case where the court held the act inapplicable on the basis of the coroner's "rough estimate" that the testatrix had died 1/150,000 of a second before the beneficiary. *In re* Estate of Rowley, 257 Cal. App. 2d 324, 65 Cal. Rptr. 139 (Dist. Ct. App. 1967). Such interpretations simply encourage litigation; it is unlikely that they reflect the intentions of the average victim in a common disaster situation.

319. UPC §§2-104 (heirs), 2-601 (devisees). The intestate provision is inapplicable if it would result in escheat. The provision governing the survivorship of devisees may be varied by the terms of the will. UPC §2-601.

320. The marital deduction may be taken only if the property actually passes to the spouse. INT. REV. CODE OF 1954, §2056. See note 321 *infra*.

321. *Id.* In large testate estates, it is common to reverse the presumption to preserve the marital deduction and thereby reduce the decedent's taxable estate. Even in a simultaneous death situation, this still results in a lower total tax on both estates, due to the progressive nature of the tax rates. See note 40 *supra*. In estates of less than $60,000, however, there is no tax advantage to be gained by such a provision, for there would be no tax in any event due on the specific exemption. INT. REV. CODE OF 1954, §2052. In such cases, and even in

costs of two administrations and the possible diversion of the decedent's property to persons other than his preferred beneficiaries. The frequency with which similar clauses appear in wills[322] would seem to indicate that a definite period of survivorship would accord with many decedents' wishes.

Advancements and Satisfaction of Devises

Occasionally a decedent may make lifetime gifts to his heirs or testamentary beneficiaries, intending them to be taken into account in making distribution of his estate. The draftsmen of the UPC point out: "Although Courts traditionally call this 'ademption by satisfaction' when a will is involved, and 'advancement' when the estate is intestate, the difference in terminology is not significant."[323] Nevertheless, the draftsmen bow to tradition and include separate provisions in different parts of the UPC.[324] The 1974 Code adopts both UPC provisions with only editorial changes and, interestingly, includes them in different chapters of the Code.[325] Both sections require written evidence of the donor's intent before the lifetime transfer can be taken into account in the distribution of the estate. This considerably restricts the common law concepts of satisfaction and advancements,[326] as well as the current advancements statute, under which parol evidence is acceptable to prove intent.[327] Although the problems do not seem to have been pressing ones to the Florida courts,[328] the necessity of written proof certainly limits the potential for future litigation. Moreover, the change reflects the modern view that "most inter vivos transfers today are intended to be absolute gifts."[329] For these reasons, the changes are useful ones that recognize the probable desires of the average decedent.

Unfortunately, the language chosen for the satisfaction statute may not prove felicitous. It first provides that the lifetime transfer can be treated as a satisfaction "only if the will provides for a deduction of the lifetime gift." The

estates with relatively small taxable estates, the additional costs of two administrations would be the predominant factor.

322. *See* UPC §2-104, Comment.

323. UPC §2-612, Comment.

324. UPC §§2-110 (advancements), 2-612 (satisfaction).

325. FPC §§733.806 (1974) (advancements), 732.609 (satisfaction).

326. *See* UPC §2-110, Comment, which also observes that the section applies only to *total* intestacy.

327. FLA. STAT. §734.07 (1973). Under the usual view, the question of whether an advancement had been made is determined solely by evidence concerning the subjective intent of the decedent at the *time* of the transfer. *See* T. ATKINSON, *supra* note 12, at 719-22. Thus, the new provisions "have a healthy effect of preventing speculation as to the nature of the transaction many years after it took place." Lilly, *supra* note 73, at 170.

328. In the last 30 years, there has been only one Florida case litigating the issue of advancements. Livingston v. Crickenberger, 141 So. 2d 794 (1st D.C.A. Fla. 1962). Since 1926, there have been only two cases involving satisfaction. Redding v. Bank of Greenville, 92 Fla. 327, 109 So. 435 (1926); *In re* Fancher's Estate, 17 Fla. Supp. 33 (Palm Beach County Judge's Ct. 1960).

329. UPC §2-110, Comment. Of course, if the decedent intends otherwise he may either execute a will stating his intentions or, less likely, may execute a writing contemporaneous with the gift. *Id.*

envisioned change in the will must be a general clause providing that a transfer after the execution of the will is to be a satisfaction.[330] If so, this conflicts with the usual view that it is the transferor's intent at the time of the transfer that is determinative,[331] a view reiterated in both statutes by the demand for "a contemporaneous writing."

Nor does the requirement of "a contemporaneous writing" seem appropriate in the satisfaction situation, although it may be in the case of intestacy.[332] The writing envisioned must be one whose execution is less formal than that of a codicil or other writing sufficient to revoke the devise in the will, yet it is given the effect of a codicil. If such a writing, although not executed in accordance with the statute of wills, is sufficient if "contemporaneous" with the transfer, there seems no reason why a similar writing executed at any time subsequent to the transfer should not be given equal effect as a substitute for a properly executed codicil revoking the devise. It would therefore seem desirable to eliminate from the satisfaction statute the reference to the provision in the will and to allow the testator's declaration to be in "a contemporaneous *or subsequent* writing." This approach would allow the testator's last written expression of intent prior to his death to be given effect, without complying with the statute of wills.[333]

The disparate treatment of advancements and satisfactions, where the donee of the lifetime transfer does not survive the decedent, should also be eliminated by striking the second "not" from the final sentence of the advancement statute.[334] It has already been noted that the UPC draftsmen consider the two concepts to be opposite sides of the same coin.[335] Yet if a devise is made to a son who fails to survive the testator, only the unsatisfied portion of the devise is saved by the anti-lapse statutes for his lineal descendants.[336] On the other hand, the advancement to the same son who fails to survive the intestate is not taken into account in computing the intestate share of the recipient's issue.[337] This different treatment cannot be justified in terms of the decedent's probable intent; indeed it seems that the intestate decedent is more likely to be interested in an equal distribution of his property among his successors than the decedent who leaves a will. Equality of treatment can only

330. This must be what is meant by the statement: "Some wills expressly provide for lifetime advances by a hotchpot clause." UPC §2-612, Comment.

331. See note 327 *supra.*

332. Conceptually, it is perhaps easier to justify allowing an informal writing to vary the law of intestate succession than it is to allow such a writing to vary testamentary provisions in the face of the strict statutory requirements for the revocation of wills. Functionally, of course, there is no basis for such a distinction.

333. This would be in accord with the other relaxations of testamentary requirements previously discussed. See text accompanying notes 136-153 *supra.*

334. FPC §733.806 (1974). The sentence reads: "If the recipient of the property does not survive the decedent, the property shall *not* be taken into account in computing the intestate share to be received by the recipient's descendants, unless the declaration or acknowledgment provides otherwise." *Id.* (emphasis added).

335. See text accompanying note 323 *supra.*

336. UPC §2-612, Comment. The anti-lapse statute has been discussed in the text accompanying notes 184-190 *supra.*

337. FPC §733.806 (1974), *quoted in* note 334 *supra.*

be obtained by reversing the effect of the last sentence of the advancements statute.

Anatomical Gifts and Cremation

The need for anatomical gifts and cremation statutes stems from the common law rule that recognized no property or property rights in the body of a deceased person.[338] Even today in the absence of statute it is doubtful to what extent a person can control the disposition of his body after death.[339] The 1974 Code carries forward the present anatomical gift law with only editorial changes[340] and adds a new section that recognizes, at least inferentially, a person's right to direct cremation of his body.[341] Again, a comparison of the provisions of the latter section and those of the anatomical gift law discloses an undesirable disparity in approach to what is basically a single problem — the extent and manner in which the wishes of a person regarding the disposition of his body can be effectuated.

The anatomical gift may be effectuated by a provision in a will that, if acted upon in good faith, is valid even though the will is later declared invalid.[342] Section 732.804 merely provides "[c]remation pursuant to a provision of a will . . . is a complete defense" for the personal representative or the person providing the services. Without statutory reassurance like that which appears in the anatomical gift act, no one may be willing to act until the validity of the provision is established by the probate of the will.

While the anatomical gift may also be made by "a document other than a will . . . signed by the donor in the presence of two witnesses who shall sign the document in his presence,"[343] provision for cremation other than in a will may only be "pursuant to a provision of . . . any *written contract* signed by the decedent in which he expressed the intent that his body be cremated . . . ."[344] Such a contract might well be signed by the decedent shortly before death and under circumstances that might raise a question about his capacity. Whether validity of the contract must be established before the personal representative or the person providing the services can safely act is uncertain. Furthermore, because a contract may not be amended or revoked at

338. 22 AM. JUR. 2d 557 (1965).

339. Annot., 7 A.L.R.3d 747, 748 (1966).

340. *Compare* FPC §§732.1001-8 (1974), *with* FLA. STAT. §§736.20-.28 (1973). Several definitions in §736.22 are eliminated in §732.1002 presumably because they were thought to be unnecessary. Two related sections concerning eye banks (§736.39) and enucleation of eyes (§736.31) were also reenacted, with editorial changes, as FPC §§732.1009-.1010.

341. FPC §732.804 (1974).

342. FPC §732.1005(1) (1974).

343. FPC §732.1005(2) (1974).

344. FPC §732.804 (1974). FLA. STAT. §733.601 provides that the named executor may carry out these instructions before appointment. While the section does not limit "written instructions of the decedent relating to his body" to a will or written contract, it may well be that the general language of the section would have to give way to the specific language regarding cremation contained in §732.804.

the option of one of the parties, the decedent is more restricted in changing his mind in the case of cremation than in making an anatomical gift.[345]

There seems no reason for distinguishing between the manner for expressing or revoking an intent to be cremated and that needed for an anatomical gift. Section 732.804 should be revised to include an adapted version of the well thought-out provisions of the anatomical gift act, thus allowing a person equal freedom to provide for cremation of his body.[346]

Aliens

The alien provision of the new law is a verbatim adoption of the UPC, simply providing that no person is disqualified to inherit because of his, or his ancestor's alienage.[347] To a certain extent this is a substantive change in the current law, because of the elimination of the so-called "iron curtain" provision,[348] due to its doubtful constitutionality.[349] As a result, alienage is no longer of any consequence in the law of wills or of intestacy.

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345. See FPC §732.1007 for the extremely liberal provisions for amending or revoking an anatomical gift.

346. Such an adaptation might read as follows:

732.804 *Provisions relating to cremation.*—

(1) A person may express his intent that his body be cremated:

(a) by a provision in his will. The provision becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the provision is nevertheless valid if it has been acted upon in good faith.

(b) by a document other than a will signed by the donor in the presence of two witnesses who shall also sign the document.

(2) A person may amend or revoke an expression in a will or other document of intent that his body be cremated:

(a) in the manner provided for amendment or revocation of wills; or

(b) by a signed statement found on his person or in his effects; or

(c) by an oral statement made in the presence of two persons; or

(d) by a statement during a terminal illness or injury addressed to an attending physician.

(3) Any person who acts in good faith and without negligence in accordance with the last known expression of intent as to cremation is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his acts.

Subdivision (3) is derived from §732.1008(3).

347. *Compare* FPC §732.110 (1974), *with* UPC §2-112.

348. FLA. STAT. §731.28(2) (1973) provides for payment into the state treasury whenever an alien resides in a territory outside the United States and "would not have the benefit or the use or control of property due him and that special circumstances make it desirable that delivery to him be deferred."

There is also another, less important, change from the existing statute; it no longer refers to an alien being entitled to "devise, bequest . . . or transmit inheritance." FLA. STAT. §731.28(1) (1973). Because there is no statutory bar to aliens' actions in this regard, this change is of little importance. The Florida constitution provides: "All natural persons are equal before the law and have inalienable rights, among which are the right . . . to acquire, possess, and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law." FLA. CONST. art. I, §2. As the legislature does not "regulate or prohibit" disposition of property there would appear to be no bar for these actions. Apparently, one

Disclaimer

The right of a beneficiary to disclaim his interest in either a testate or intestate estate merits mention because of its importance as a tool in post-mortem planning. The new provision requires no discussion here, however, because it is merely a continuation of existing law with editorial changes.[350]

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reason the UPC included this provision was to continue the effort to eliminate the distinction between real and personal property (a distinction already eliminated in Florida). The comment to §2-112 states: "The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obliagtion of the tenant of the King." UPC §2-112, Comment.

349. The possible unconstitutionality of similar state statutes was recognized by the drafters of the UPC in their comment to the provision on alienage:

"This section has broader vitality in light of the recent decision of the United States Supreme Court in Zschernig v. Miller, 88 S. Ct. 664, 389 U.S. 429, 19 L. Ed. 2d 683 (1968) holding unconstitutional a state statute providing for escheat . . . [under requirements similar to the current Florida statute]. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is 'an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.'" UPC §2-112, Comment.

350. *Compare* FPC §732.801 (1974), *with* FLA. STAT. §731.37 (1973). For a detailed discussion of the use of disclaimer as an estate planning tool, see FLORIDA WILL DRAFTING AND ESTATE PLANNING §13.36 (Fla. Bar Continuing Legal Educ. 1972).

APPENDIX A

CROSS REFERENCES FROM 1973 FLORIDA STATUTES TO COMPARABLE SECTIONS OF CHAPTER 74-106

Note: Many of the listed sections have undergone substantive change. Those not listed do not appear in chapter 74-106.

1973 Sections	Chapter 74-106 Sections
690.02	737.601
690.03	737.602, .615
690.04	737.603
690.05	737.604
690.06	737.606
690.07	737.607
690.08	737.608
690.09	737.608
690.10	737.609
690.11	737.611
690.12	737.612
690.13	737.613
690.14	737.614
691.03	737.401, .402
691.04	737.402, .404
691.11	737.501
691.12	737.502
691.13	737.503
691.14	737.504
691.15	737.505
691.16	737.506
691.17	737.507
691.18	737.508
691.19	737.509
691.20	737.510
691.21	737.511
691.22	737.512
731.01	731.101
731.03	731.201
731.04	731.501
731.05	732.516, .602
731.051	732.701
731.07	732.502
731.071	732.503
731.10	732.301
731.101	732.507
731.11	732.302
731.12	732.505
731.13	732.505
731.14	732.506, .507
731.15	732.508
731.16	732.509
731.17	732.510
731.18	732.511
731.19	732.803
731.20	732.603, .604
731.21	732.514, 733.102
731.23	732.102, .103
731.24	732.105
731.25	732.104
731.27	732.401
731.28	732.110
731.29	732.108
731.30	732.108
731.31	732.802
731.33	732.107
731.34	732.201
731.35	732.202, .203
731.36	732.402
731.37	732.801
732.06	733.101
732.09	731.301, .302
732.14	733.106
732.21	733.501
732.22	732.901
732.23	733.202
732.24	733.201
732.26	733.103
732.27	733.207
732.28	733.210
732.30	733.109
732.31	733.107
732.32	733.208
732.33	733.902
732.34	733.204
732.35	733.206
732.37	733.205
732.42	733.211
732.43	733.202, .203
732.44	733.301
732.45	733.302
732.46	733.303
732.47	733.304
732.49	733.305
732.51	733.306
732.52	733.307
732.55	733.308
732.61	733.402
732.63	733.403
732.64	733.403
732.65	733.403, .404
732.66	733.403
732.67	733.402
732.68	733.405
732.69	733.403
733.01	733.607, .608, 737.605(2)

1973 Sections	Chapter 74-106 Sections
733.03	733.604
733.05	733.605
733.08	733.612
733.15	733.701
733.16	733.702, .703
733.17	733.704
733.18	733.705
733.19	733.706
733.20	732.403, 733.707
733.21	733.708
733.211	733.709
733.22	733.613
733.23	733.613
733.225	733.613
733.31	733.610
733.32	733.612
733.361	733.612
733.38	733.612
733.39	733.612
733.40	733.612
733.41	733.611
733.42	733.611
733.52	733.609
733.53	733.609
734.01	733.605, .617
734.02	733.801
734.03	733.802
734.031	733.810
734.041	733.817
734.05	733.805
734.051	733.803
734.06	733.807
734.07	733.806
734.09	733.502
734.10	733.503
734.11	733.504
734.12	733.505
734.13	733.506
734.14	733.507
734.15	733.508
734.16	733.509
734.22	733.901
734.221	733.816
734.25	733.105
734.26	733.903
734.27	733.104
734.29	733.108, 734.103
734.30	734.101
734.31	734.102
734.32	734.103
735.01	735.201
735.02	735.102, .202
735.04	735.301
735.05	735.203, .204
735.051	735.205
735.07	735.206
735.09	735.207
735.10	735.208
735.11	735.207
735.14	735.209
735.15	735.302
736.05	732.601
736.06	734.104
736.17	732.513
736.172	733.808
736.21	732.1001
736.22	732.1002
736.23	732.1003
736.24	732.1004
736.25	732.1005
736.26	732.1006
736.27	732.1007
736.28	732.1008
736.29	732.1009
736.31	732.1010
744.01	744.101
744.03	744.102
744.05	744.103
744.10	744.201
744.11	744.202
744.13	744.301
744.14	744.302
744.15	744.306
744.16	744.307
744.18	744.308
744.19	744.308
744.21	744.308
744.24	744.308
744.25	744.308
744.26	744.308
744.27	744.309
744.30	744.310
744.31	744.310
744.315	744.310
744.33	744.310
744.34	744.311
744.35	744.312
744.36	744.401
744.38	744.402
744.40	744.313
744.42	744.403
744.43	744.404
744.47	744.105
744.48	744.203
744.481	744.204
744.482	744.205
744.483	744.204
744.484	744.206

1973 Sections	Chapter 74-106 Sections
744.49	744.203
744.50	744.207, .502(8)
744.51	744.314
744.52	744.314
744.53	744.314
744.54	744.315
744.59	744.316
744.60	744.317
744.601	744.317
744.61	744.318
744.62	733.319
744.64	744.320
744.65	744.321
744.66	744.501(16)
744.68	744.501(21)
745.01	744.501(5)
745.02	744.501(6)
745.03	744.501(2), (17), (18)
745.05	744.501(15)
745.06	744.503
745.07	744.503
745.09	744.504
745.11	744.501(15)
745.12	744.501(15)
745.14	744.505
745.15	744.506
745.16	744.501(1)
745.17	744.501(1)
745.18	744.501(1)
745.19	744.501(15)
745.20	744.501(19)
745.21	744.507
745.23	744.501(20)
745.25	744.323
745.26	744.324
745.27	744.324
745.28	744.325
745.29	744.326
745.30	744.327
745.33	744.322
746.01	744.405
746.02	744.406
746.03	744.407
746.04	744.408
746.05	744.409
746.06	744.410
746.07	744.411
746.08	744.411
746.12	744.412
746.121	744.413
746.13	744.414
746.14	744.415
FLA. CONST. art. X, §4(c)	732.516

APPENDIX B*

THE 1974 FLORIDA PROBATE CODE: TITLES, SOURCES, AND ARTICLE REFERENCES

Note: Many procedural provisions have been omitted from the 1973 "source" statutes and there have been editorial changes made in almost all sections. These changes are not mentioned; when changes are noted (chgs.), they are believed to be substantive. Article references refer to both the text and footnotes accompanying the designated footnote numbers.

1974 Code Section	Title	Source	Article Reference
731.101	Short title	UPC §101; F.S. §731.01	nn. 8-10
732.101	Intestate estate	UPC §2-101	n. 45
732.102	Share of spouse	UPC §2-102 (chgs.); *see* F.S. §731.23	nn. 45-55, 242-245
732.103	Share of other heirs	UPC §2-103 (chgs.); F.S. §731.23 (chgs.)	nn. 50-66, 79-80
732.104	Inheritance per stirpes	F.S. §731.25	nn. 42, 50
732.105	Half-blood	F.S. §731.24	nn. 44, 69, 218
732.106	Afterborn heirs	UPC §2-108 (chgs.)	nn. 311-315
732.107	Escheat	F.S. §731.33 (chgs.); *see* UPC §2-105	nn. 44, 61
732.108	Adopted persons & persons born out of wedlock	UPC §2-109; *see* F.S. §§731.29, .30	nn. 70-96, 217-219, 283, 290, 292
732.109	Debts of decedent	UPC §2-111	nn. 189-190
732.110	Aliens	UPC §2-112; *see* F.S. §731.28	nn. 347-349
732.111	Dower & curtesy abolished	UPC §2-113	
732.201	Right to elective share	UPC §2-201 (chgs.); *see* F.S. §731.34	nn. 176, 246-263
732.202	Election to take elective shares	UPC §2-203; F.S. §731.35	nn. 176, 266-272
732.203	Preexisting right to dower	F.S. §731.35(4)	nn. 176, 257
732.204	Proceedings on the election	UPC §2-205(d) (chgs.)	nn. 176, 266-272
732.301	Pretermitted spouse	F.S. §731.10; UPC §2-302	nn. 156, 163-167
732.302	Pretermitted children	F.S. §731.11 (chgs.); UPC §2-302	nn. 156, 163-168
732.401	Descent of homestead	F.S. §731.27	nn. 55, 227-230
732.402	Exempt property	UPC §2-402 (chgs.); F.S. §731.36	nn. 55, 231-235, 243

1974 Code Section	Title	Source	Article Reference
732.403	Family allowance	UPC §2-403 (chgs.); *see* F.S. §733.20	nn. 55, 236-245, 279
732.501	Who may make a will	UPC §2-501; *see* F.S. §731.04	n. 100
732.502(1)	Execution of wills	F.S. §§731.07(1), (2) (chgs.)	nn. 104, 107-135
732.502(2)		F.S. §731.07(3) (chgs.)	nn. 123-125
732.502(3)		F.S. §731.07(5)	nn. 113, 119
732.502(4)		F.S. §731.07(6)	
732.502(5)		F.S. §731.07(7)	n. 106
732.503	Self-proof of will	F.S. §731.071 (chgs.); UPC §2-504 (chgs.)	nn. 126-135
732.504(1)	Who may witness	UPC §2-505(a)	
732.504(2)		UPC §2-505(b) (chgs.)	n. 119
732.505	Revocation by writing	F.S. §§731.12, .13; *see* UPC §2-507(1)	nn. 154, 160
732.506	Revocation by act	F.S. §731.14(1); *see* UPC §2-507(2)	nn. 155, 160
732.507	Effect of subsequent marriage, birth, or dissolution of marriage	F.S. §§731.14(2), .101; *see* UPC §2-508	nn. 156, 169-176
732.508	Revival by revocation	F.S. §731.15 (chgs.)	nn. 177-180
732.509	Revocation by codicil	F.S. §731.16	n. 177
732.510	Republication of wills by codicil	F.S. §731.17	n. 177
732.511	Republication of wills by reexecution	F.S. §731.18	n. 177
732.512	Incorporation by reference	UPC §2-510	nn. 136-140
732.513	Devises to trustees	F.S. §736.17; *see* UPC §2-511	nn. 143-144
732.514	Vesting of devises	F.S. §731.21	
732.515	Separate writing identifying devises of tangible property	UPC §2-513 (chgs.)	nn. 150-153
732.516	Devise of homestead	FLA. CONST. art. X, §4(c), *as amended*, F.S. §731.05	nn. 227-230
732.517	Penalty clause for contest	UPC §3-905 (chgs.)	nn. 307-309
732.601	Simultaneous death law	F.S. §736.05	nn. 181, 211, 316-322

1974 Code Section	Title	Source	Article Reference
732.602	Construction that will passes all property	UPC §2-604; *see* F.S. §731.05(2)	nn. 183, 212
732.603	Anti-lapse; deceased devisee; class gifts	UPC §2-605 (chgs.)	nn. 184-190
732.604	Failure of testamentary provision	UPC §2-606; *see* F.S. §731.20(2)	n. 185
732.605	Change in securities; accessions; nonademption	UPC §2-607 (chgs.)	nn. 191-198
732.606	Nonademption of specific devises in certain cases; sale by guardian of the property; unpaid proceeds of sale, condemnation, or insurance	UPC §2-608	nn. 197, 199-210
732.607	Exercise of power of appointment	UPC §2-610	n. 214
732.608	Construction of generic terms	UPC §2-611 (chgs.)	nn. 216-220, 283
732.609	Ademption by satisfaction	UPC §2-612	nn. 211, 323-337
732.610	Devises to be per stirpes	New	nn. 221-222
732.701(1)	Agreements concerning succession	F.S. §731.051	nn. 300-306
732.701(2)		UPC §2-701	nn. 300-306
732.702(1)	Waiver of right to elect & of other rights	UPC §2-204 (chgs.)	nn. 273-279
732.702(2), (3)		New	nn. 273-276
732.801	Disclaimer of interests in property passing by will or by intestate succession or under certain powers of appointment	F.S. §731.37	n. 350
732.802	Murderer	F.S. §731.31	nn. 251-299
732.803	Charitable devises	F.S. §731.19 (chgs.)	nn. 113, 280-286
732.804	Provisions relating to cremation	New	nn. 338-346
732.901	Production of wills	F.S. §732.22	
732.1001-.1010	Anatomical gifts	F.S. §§736.21-.31	nn. 338-346
733.601	Time of accrual of duties & powers	UPC §3-701	n. 344
733.701	Notice to creditors	F.S. §733.15(1); UPC §3-801	n. 267

1974 Code Section	Title	Source	Article Reference
733.806	Advancement	UPC §2-110; *see* F.S. §734.07	nn. 323-337
733.817	Apportionment of estate taxes	F.S. §734.041 (possible chgs.)	nn. 262-265

* This appendix covers only those sections of the 1974 Code that are discussed in this portion of the article. The remaining sections will be indexed in part II of this article.