INTESTATE SUCCESSION AND WILLS: A COMPARATIVE ANALYSIS OF ARTICLE II OF THE UNIFORM PROBATE CODE AND THE LAW OF OHIO

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The Uniform Probate Code[1] was promulgated by the National Conference of Commissioners on Uniform State Laws on August 7, 1969, and was approved by the House of Delegates of the American Bar Association[2] one week later. This bold and progressive achievement[3] completed the first phase of a project which began in 1962;[4] the second phase of that project is now under way, the objective of which is to introduce the Code before the legislatures of the several states with the purpose of state enactment.[5] It is perhaps too soon to paraphrase Justice Cardozo's famous observation on the demise of the doctrine of privity of contract,[6] but the "assault upon the citadel of probate" has begun—and none too soon. In the past few years there has been unparalleled public criticism of existing probate practices.[7]

The Uniform Probate Code states as its intended purposes the following: "(1) to simplify and clarify the law . . . ; (2) to discover and make effective the intent of the decedent . . . ; (3) to promote a speedy and efficient system for liquidating the estate . . . ; (4) to facilitate use and enforcement of certain trusts; (5) to make uniform the law . . . ."[8] Thus the Code attempts to overcome the high cost and long delays that are presently built into most states' probate procedure. An additional national purpose of the Code is to upgrade the probate court and establish it as a

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1 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE (1969) [hereinafter cited as UNIFORM PROBATE CODE].

2 UNIFORM PROBATE CODE, 55 A.B.A.J. 976 (1969).

3 Straus, *The Uniform Probate Code Approved: A Bold and Progressive Reform*, 41 PA. B. ASS'N. Q. 71 (1969).

4 Wellman, *The Uniform Probate Code: Blueprint for Reform in The 70's*, 2 CONN. L. REV. 453 (1970).

5 "The Uniform Probate Code has been enacted in Alaska and Idaho to date. It is before the legislatures in Arizona and Michigan and is making good progress toward introduction in Colorado, Washington, Hawaii, Nebraska and some other states." Letter From Richard V. Wellman, Educational Director of the Joint Editorial Board for the Uniform Probate Code, to the author, October 3, 1972.

6 "The assault upon the citadel of privity is proceeding in these days apace." Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

7 N. DALEY, HOW TO AVOID PROBATE (1965); M. BLOOM, THE TROUBLE WITH LAWYERS (1968); Bloom, *The Mess in Our Probate Courts*, Reader's Digest, Oct. 1966, at 102; Bloom, *Time to Clean Up Our Probate Courts*, Reader's Digest, Jan. 1970, at 112; Taylor, *You can Avoid the Probate Trap*, Reader's Digest, June 1970, at 93; Bloom, *At Last: A Way to Settle Estates Quickly*, Reader's Digest, Sept. 1972, at 193.

8 UNIFORM PROBATE CODE § 1-102(b).

court of record with broad jurisdiction over the subject areas that are generally considered to be probate matters, equivalent to the jurisdiction of a general trial court.[9] In states in which the probate court is established as a division of the general trial court there is no need to adopt such provisions. In states comparable to Ohio, however, in which there currently exist alternative provisions for the establishment of a probate court, the enacting of such provisions is necessary to establish uniformity within the state.[10]

The Uniform Probate Code covers the areas of law that relate to the work of the courts which handle, in the broadest sense, those areas generally referred to as "probate law":[11] the administration of decedent's estates, guardianships, testamentary trusts, and the substantive law of intestate succession and wills.[12] This discussion, however, is limited to an analysis of Article II, which deals with the substantive law of intestate succession and wills. The reason for choosing this particular article, aside from the fact that the Code is too broad to cover in a detailed analysis in one article, is that Article II is one of the most controversial Articles in the Code. Critics of Article II have called it confusing and complicated.[13] Perhaps one of the reasons for this controversy is that the area of intestate succession and wills is the area of probate law with which lawyers are most familiar and thus the most concerned. Old and familiar rules always seem less complicated than new and unfamiliar ones. The approach of this discussion will be to take each section of Article II and compare it to existing Ohio law. It is hoped that this discussion will facilitate an examination of the Uniform Probate Code by the Ohio bar and legislature. If this study acts as a catalyst for a further discussion of the Uniform Probate Code in Ohio in the form of a legislative study commission to consider the adoption of the Code, then the author's goal will have been more than achieved. In addition, it is hoped that this analysis will serve as a useful tool for students and attorneys, not only during the desired public debate on the Uniform Code in Ohio, but also during the transition period should it be adopted.

The Uniform Code has, in appropriate places, added alternative provisions for adoption in community property states.[14] Because Ohio is not a

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[9] Wellman, *supra* note 4, at 477.

[10] OHIO REV. CODE ANN. §§ 2101.43-.45 (Page 1968).

[11] O'Connell & Effland, *Interstate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 207 (1972) [hereinafter cited as O'Connell & Effland].

[12] The Uniform Code is organized as follows: Article I, General Provisions, Definitions and Probate Jurisdiction of Court; Article II, Intestate Succession and Wills; Article III, Probate of Wills and Administration; Article IV, Foreign Personal Representatives; Ancillary Administration; Article V, Protection of Persons under Disability and their Property; Article VI, Non-Probate Transfers; Article VII, Trust Administration; Article VIII, Effective Date and Repealer.

[13] Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L. F. 413, 415 (1970) [hereinafter cited as Zartman].

[14] Uniform Probate Code §§ 2-102 (A), 2-401 (A), 3-101 (A), and 3-902 (A).

community property state I have excluded from my discussion these alternative provisions.

I. INTESTATE SUCCESSION

Intestate succession laws in a democracy should have patterns of distribution that reflect the wishes of the majority of its citizens who die intestate. In order to determine those wishes, a legislature should make an attempt to discover how the average person would wish to dispose of his property at his death, and then draft intestate succession statutes consistent with those wishes. Such a determination requires the identification of the important characteristics of those who die intestate and an examination of the will provisions of persons who die testate and possess those same characteristics. On the basis of this type of analysis the legislature can determine the probable intent of those persons who die intestate.[15] One recent empirical study[16] completed in Ohio[17] shows that most of those who die intestate are younger,[18] more likely to be single,[19] less wealthy,[20] and of a lower social-occupational[21] status than those who die testate. By comparing a sample of wills of persons in similar circumstances to the "average" person who dies intestate, one can determine by inference the testamentary wishes of such "average" intestate.

This is the approach that the drafters of the Uniform Probate Code have taken.[22] By using the data made available by recent and authoritative studies[23] which have identified the characteristics of decedents who die intestate and comparing those characteristics to decedents who die testate, in addition to relying upon the experience and opinions of lawyers who help clients with wills,[24] the drafters of the Uniform Probate Code have been able to outline the common wishes of the average decedent.[25]

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[15] O'Connell & Effland, *supra* note 11, at 209.

[16] M. SUSSMAN, J. CATES, & D. SMITH, THE FAMILY AND INHERITANCE (1970) [hereinafter cited as M. Sussman].

[17] The study was done in Cuyahoga County, Ohio. A five percent random sample was taken of all estates closed by the probate court of that county between November 9, 1964, and August 8, 1965. *Id.* at 45.

[18] *Id.* at 65.

[19] *Id.* at 70.

[20] The gross median size for testate estates in this sample was $15,000; the median for intestate estates was $6,000. Net estate medians were $12,000 and $3,000 for testate and intestate, respectively. The average net estate for all decedents was $27,007; for testate decedents, $35,160; and for intestate decedents, $6,694. The average gross estate for all decedents was $31,097; for testate decedents, $41,218; for the intestate group, $8,599.
Id. at 73.

[21] *Id.* at 76.

[22] Wellman, *Selected Aspects of Uniform Probate Code*, 3 REAL PROP., PROBATE & TRUST J. 199, 204 (1968).

[23] *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963); M. Sussman, *supra* note 16, at 86.

[24] Wellman, *supra* note 22, at 204.

[25] UNIFORM PROBATE CODE Article II, Part 1, General Comment:

As an aid in evaluating the Uniform Probate Code and the effect its adoption would have upon the present laws of Ohio, I have attempted to contrast it with similar Ohio statutes, or in those areas in which there are no statutes in Ohio, to the Ohio case law. The inclusion of each section of Article II is intended to furnish the reader with a general idea of the likely effect of each section upon the present law in the event the Code is adopted in Ohio. Since the consideration of the Proposed Code offers an opportunity for thorough revision of the law in this area, I have suggested two additional alterations to the current Ohio law of intestate succession at the end of this section.

A. *The Proposed Uniform Probate Code and Present Ohio Law*

> Section 2-101 Intestate Estate.
> Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this Code.

The law in Ohio is the same. While there is no Ohio statute directly on point, the common law rule should govern. The Ohio legislature has inferred as much in the statute[26] dealing with the application of undevised real estate to debts, "[w]hen part of the real estate of a testator descends to his heirs because it was not disposed of by his will . . . ."[27]

> Section 2-102 Share of the Spouse.
> The intestate share of the surviving spouse is:
> (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
> (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000],[28] plus one-half of the balance of the intestate estate;
> (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;
> (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

This section leaves the surviving spouse a larger share of the decedent's estate than does the present Ohio statute.[29] Under Ohio law there is no provision for the surviving spouse to take a lump sum before the division

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The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.

[26] OHIO REV. CODE ANN. § 2107.53 (Page 1968).

[27] *Id.*

[28] The $50,000 amount is bracketed to indicate that the commissioners did not attempt to specify appropriate amounts. This has been left to the discretion of the legislature. Wellman, *Acceptable Variations Within The Code*, 2 UNIFORM PROBATE CODE NOTES (Oct. 1972).

[29] OHIO REV. CODE ANN. §§ 2105.06(B)-(D) (Page 1968).

of the estate. If there is one child or its issue surviving, the spouse and the child or its issue share equally;[30] if there is more than one child or the issue of more than one, the spouse takes one-third and the children take two-thirds equally.[31] Under Ohio's statute, parents receive one-fourth if there is a surviving spouse but no children or their issue, and the spouse receives three-fourths.[32] It would appear that this dispository scheme does not reflect the testamentary intent of the average decedent. The empirical study[33] mentioned above shows that in cases in which the decedent was survived by a spouse and either parents or issue, almost 86 percent of the testators left their entire estate to the surviving spouse.[34] Other studies reflect similar kinds of dispositive patterns.[35]

Under the Uniform Code, the surviving spouse takes the first $50,000 and one-half of the balance of the estate if there are either parents or issue who are also issue of the surviving spouse surviving the decedent. If there is neither surviving issue nor parents, the entire estate passes to the spouse. While the $50,000 figure is a suggested one, it is based on the idea that in a small estate[36] the surviving spouse should have it entirely if the only children are issue of both. This not only avoids the problems of passing property to minor children, but is in accord with the probable intent of the decedent, as indicated by the empirical studies. If there are surviving issue of the decedent who are not issue of the surviving spouse, then the $50,000 provision is omitted and the surviving spouse shares equally with the issue as a class, one-half to each. In this situation we do not have the presumption (that exists in the case in which the children of the decedent are also the children of the surviving spouse) that the surviving spouse will provide for the children of the decedent. This provision is consistent with the findings of the Ohio study, which indicated that a testator usually divides his estate between the surviving spouse and legatees of an earlier marriage when the estate is large enough.[37]

There are several advantages to the Uniform Probate Code as opposed to Ohio law in the common situation in which the decedent leaves a surviving spouse. First, the Code is more consistent with the probable intent of most decedents—unless there are children of a previous marriage, most persons who have wills leave their entire estate to their spouse. In this case, the Uniform Code protects the children of the previous marriage from

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[30] *Id.* § 2105.06(B).

[31] *Id.* § 2105.06(C).

[32] *Id.* § 2105.06(D).

[33] M. Sussman, *supra* note 16.

[34] *Id.* at 89.

[35] Durman, *supra* note 23, at 258-63.

[36] The drafters considered a small estate to be one that would be less than $50,000 after all allowances and exempt property are deducted. UNIFORM PROBATE CODE § 2-102, Comment.

[37] M. Sussman, *supra* note 16, at 91.

being disinherited by the surviving spouse. Second, should there be minor children who are also children of the surviving spouse, the Code eliminates the necessity of creating costly and cumbersome guardianships of property in the vast majority of cases.[38] The Code also simplifies the problem of title to land in many cases. Under Ohio law the issue, or the parents of the decedent, if there are no issue, share with the surviving spouse an undivided interest in realty left by the decedent. If one party refuses to sell when the others wish to do so, however, many complications may arise.[39]

> Section 2-103 Share of Heirs Other Than Surviving Spouse.
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> The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:
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> (1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
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> (2) if there is no surviving issue, to his parent or parents equally;
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> (3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;
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> (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.[40]

In Ohio the children of a decedent receive one-half to two-thirds of the estate, depending upon whether there are one or more children.[41] The Uniform Probate Code makes no distinction as to the children's share based upon the number of children or issue the decedent left. After the spouse

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[38] *See* note 20 *supra.*

[39] O'Connell & Effland, *supra* note 11, at 213.

[40] The Joint Editorial Board for the Uniform Probate Code has recommended that § 2-103 be changed by eliminating the use of the words "brother" and "sister," and substituting in their place "issue of parents." The Board gives as its reason for this proposed change the following:

> "Brother" and "Sister" are not defined in the Code; "parent and issue" are defined in ways that leave no question about the status of illegitimate and adopted persons. We did not want "brother" to include a blood brother who had been adopted into another family when the basic position of the Code regarding adoption is that it effects a full transplant.

2 UNIFORM PROBATE CODE NOTES (Oct. 1972).

[41] OHIO REV. CODE ANN. §§ 2105.06(B), (C) (Page 1968).

receives the share provided by § 2-102, or if there is no spouse, the issue take equally if they are of equal consanguinity; if they are not, they take per stirpes. If, for example, three children survive the decedent, each child would take a one-third share; however, if one of these three children had predeceased the decedent, leaving two children (grandchildren of the decedent), the two children who survived the decedent would each receive a one-third share and the children of the predeceased child would each receive a one-sixth share. This is also true under Ohio law.[42]

After the issue of the decedent, assuming there is no surviving spouse, parents are next in the order of taking, and under the Code they are followed by brothers and sisters of the decedent and their issue; the same is true in Ohio.[43] The Uniform Code provision for grandparents and their issue is also the same as in Ohio: the estate is divided in half, one part going to the paternal side, the other to the maternal side. If there are no grandparents or their issue on one side, then the whole passes to the other side of the family.[44] Both the Code and the Ohio statute allow the issue of grandparents to take by representation.

At this point the Uniform Probate Code deviates from the Ohio statutory scheme. The Uniform Code prevents relatives more remote than grandparents and their issue from taking. These relatives, who would be the next-of-kin,[45] take under the current Ohio provisions if there are no grandparents or their issue. The Ohio statute provides that next-of-kin take on a *per capita* basis, with no right of representation.[46] There is another provision in Ohio not found in the Uniform Probate Code, which provides for stepchildren of the decedent or their issue to take if there are no next-of-kin.[47]

There is considerable merit in the inheritance limitation contained in the Uniform Code; in our mobile and urban society, known family relationships rarely extend beyond the group included under it.[48] In most cases it is unlikely that a decedent would even be acquainted with his remote collateral relatives and most of these distant relatives probably do not want an inheritance from persons they have never known or even seen.[49] For many years commentators have been suggesting that the rules of succes-

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[42] *Id.* § 2105.13; Snodgrass v. Bedell, 134 Ohio St. 311, 16 N.E. 2d 463 (1938); Parsons v. Parsons, 52 Ohio St. 470, 40 N.E. 165 (1895); Dutoit v. Doyle, 16 Ohio St. 400 (1865).

[43] OHIO REV. CODE ANN. §§ 2105.06(E), (F) (Page 1968).

[44] *Id.* § 2105.06(G), (H) (Page 1968).

[45] "Next-of-kin" as used in the Ohio statute connotes great-grandparents and their issue or beyond. OHIO REV. CODE ANN. § 2105.06(H) (Page 1968).

[46] *Id.*

[47] *Id.* § 2105.06(I).

[48] M. Sussman, *supra* note 16, at 138-42.

[49] O'Connell & Effland, *supra* note 11, at 215; M. Sussman, *supra* note 16, at 139-40.

sion be changed to prevent these unintended windfalls.[50] Also, by allowing remote kindred to inherit, the problems involved in administration are multiplied, for if the heirs are not readily available a time consuming and expensive search is required with no assurance of finding any or all of the heirs. Typically in these cases, the professional heir hunters who work on a percentage basis of from one-third to one-half of the estate, and the attorney and administrator who handle the estate, gain far more than the heirs. Often, if the heirs are found, the number of claimants requires that the estate be fragmented into less than token amounts.[51] Further, since standing to contest a will exists in any potential heir, allowing remote relatives to take can increase the delay and expense of settling the estate by a will contest.[52]

The policy of unlimited succession such as we have in Ohio has its basis in history: it is the result of our adoption of the English scheme of distribution in intestacy.[53] Mr. Justice Holmes once stated that it was "revolting" that a rule of law should persist solely from "blind imitation of the past."[54] A policy which allows "laughing heirs" potentially to take, and thus complicate the probate procedure, should not be allowed to continue in a modern society, simply on the basis of its historical precedence.

> Section 2-104 Requirement That Heir Survive Decedent For 120 Hours.
> Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

Ohio's present law[55] is very similar to the Code. The major difference is that under the Ohio statute the heir, legatee or devisee must survive 30 days[56] after the death of the decedent, unless the will of the decedent provides otherwise. The two statutes are the same as to the presumptive order of death when it cannot actually be determined, but the 30-day provi-

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

51 M. Sussman, *supra* note 16, at 140-41.

52 O'Connell & Effland, *supra* note 11, at 215.

53 *See* 6 POWELL, THE LAW OF REAL PROPERTY ¶ 998 at 664 (1972).

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

55 OHIO REV. CODE ANN. § 2105.21 (Page 1968).

56 Henry v. Central Nat'l. Bank, 16 Ohio St.2d 16, 242 N.E.2d 342 (1968).

sion of the Ohio statute seems preferable to the five day provision of the Uniform Code. The purpose of the section is to prevent multiple probate of the same property when both the owner and the taker die within a relatively short time of each other. By maintaining the 30-day provision, the administration of the decedent's estate is not appreciably delayed, nor are tax advantages or consequences changed;[57] furthermore, the probability of including lingering victims of common disasters or suicides is increased.

The Code differs from Ohio law in another respect: the survivorship requirement, under the Code, does not apply to cases in which it would prevent an inheritance by the last eligible relative of an intestate who survived the intestate for any period.[58] This prevents property from unnecessarily escheating to the state in those cases.

> Section 2-105 To Taker.
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> If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Ohio law[59] also provides for property to escheat to the state if there are no takers among any of the allowable degrees of kinship. The Uniform Probate Code leaves to the discretion of the legislature the determination of how escheating property shall be applied. Presumably the present Ohio provisions[60] would still be applicable.

> Section 2-106 Representation.
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> If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Both the Uniform Probate Code[61] and the Ohio statutes[62] provide for the issue of a predeceased member of the primary class to share in the decedent's estate. Under the Ohio statute[63] the heirs in the nearest living class of relatives take *per capita*, while lineal descendents of deceased members of this primary class take per stirpes,[64] unless they are so far removed

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[57] INT. REV. CODE OF 1954, § 2056(b)(3).

[58] UNIFORM PROBATE CODE § 2-104, Comment.

[59] OHIO REV. CODE ANN. § 2105.06(J) (Page 1968).

[60] *Id.* §§ 2105.07, .09. Personal property is to be applied to the support of the schools of the county in which the property is collected. Real property, depending on whether it is in or out of a city, is to be used for health, welfare or recreational purposes if the former, and to promote agriculture if the latter.

[61] UNIFORM PROBATE CODE §§ 2-103, 106.

[62] OHIO REV. CODE ANN. §§ 2105.06, .11-.13 (Page 1968).

[63] *Id.* § 2105.12. "When all the descendants of an intestate, in a direct line of descent, are on an equal degree of consanguinity to the intestate, the estate shall pass to such persons in equal parts, however remote from the intestate such equal and common degree of consanguinity may be."

[64] *Id.* § 2105.13.

in kinship so as to fall within the "no representation" provision of the statute of descent and distribution.[65] This prohibits representation when the next of kin are more remote than lineal descendants of the grandparents. If it were not for the exception provided by § 2105.12 of the Ohio Revised Code, the per stirpes provision of the descent and distribution statute would require division among lineal descendants on a per stirpes basis, regardless of the fact that all members of the closest living class were of an equal degree of kinship to the decedent.[66] Both Ohio and the Uniform Probate Code have rejected this pattern of distribution and have provided that the first and principle division will be to the nearest class which includes living members.

There is one situation, both under the present Ohio law and the Uniform Probate Code, that seems to result in an inequitable distribution: if the decedent leaves as his nearest relatives a living brother or sister, one child of a predeceased brother or sister, and several children of another predeceased brother or sister, the living sibling would take one-third, the child of the deceased sibling would take a third by representation, and the several children of the other deceased sibling would share a one-third interest. This method of distribution is contrary to the basic principle that there should be equality among persons who are of the same degree of consanguinity. No good reason has been suggested for the failure to preserve the principle of equality among the children of predeceased siblings when one or more of the decedent's siblings survive. A more equitable division would be to give the surviving sibling his one-third share and divide the remaining two-thirds equally among all of the children of those siblings who did not survive the decedent.[67]

> Section 2-107 Kindred of Half Blood.
> Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

A half blood relationship exists when two persons are related to only one common ancestor, as, for example, when a person has children by more than one spouse. The children of each of these unions are related by the half blood to the children of the other, as are their descendants. Ohio's present statute of descent and distribution provides that if no spouse, children or their lineal descendants, or parents survive the decedent, then the decedent's estate passes "to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per

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[65] *Id.* § 2105.06(H).

[66] Ewers v. Follin, 9 Ohio St. 327 (1859); Goff v. Disbennet, 14 Ohio C.C.R. (n.s.) 557, 23 Ohio C. Dec. 234 (C.P. 1911).

[67] O'Connell & Effland, *supra* note 11, at 217-18; *See also* McCall & Langston, *A New Intestate Succession Statute for North Carolina*, 11 N.C.L. REV. 266, 290-92 (1933); Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 Nw. U.L. Rev. 626 (1971).

stirpes."[68] The statute makes no reference to half blood kinship other than to this class. The Ohio courts have held, however, that if the intestate's heirs include first cousins of the whole and of the half blood, no distinction is to be made between them for purposes of descent and distribution. One court has stated that "[t]he civil law of descent is followed in Ohio and under that law kindred of the half-blood are recognized. . . . Remote collaterals of the half blood are entitled to share with those of the whole blood in real, as well as personal, property, or even to take in preference to kindred of the whole blood of a more remote degree."[69] The Uniform Probate Code has adopted the rule of a majority of states concerning inheritance by relatives of the half blood[70] and thus would not change Ohio's law on this point.

> Section 2-108 Afterborn Heirs.
> Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

Generally speaking, a person must have been born at the time of the decedent's death to qualify as an heir in Ohio. Exception is made, however, for lineal descendants of the intestate "begotten before his death, but born thereafter,"[71] in which case the descendant inherits as if he had been born prior to the decedent's death. If, for example, the decedent is survived by the wife of a predeceased son, who gives birth to a child of that union after the death of the decedent, the grandchild will share in his grandparent's estate.

The Ohio statute limits this exception to descendants of the intestate, while the Uniform Probate Code applies the exception to the much broader class of relatives of the intestate, which would include all of the decedent's heirs conceived but not born during his lifetime. Under the present Ohio statute, the exception does not apply to collateral heirs. Thus, if a nephew heir of the decedent predeceased him, leaving a wife who had a child prior to the decedent's death, the grandnephew could not inherit under the Ohio statute even though his older brothers and sisters could. This applies even if it would mean that the estate would pass to a more distant heir. By adopting the rule followed in a majority of states,[72] the Uniform Code would allow the grandnephew to share in the inheritance. Adoption of the Code would thus change the present law which specifically limits afterborn heirs to the class of the decedent's descendants.[73]

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[68] OHIO REV. CODE ANN. § 2105.06(F) (Page 1968).

[69] Sheeler v. Burkhart, 62 Ohio L. Abs. 356, 101 N.E.2d 401, 402-03 (P. Ct. 1951).

[70] T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 19 (2d ed. 1953).

[71] OHIO REV. CODE ANN. § 2105.14 (Page 1968).

[72] T. Atkinson, *supra* note 70, at § 20.

[73] "[B]ut in no other case can a person inherit unless living at the time of the death of the intestate." OHIO REV. CODE ANN. § 2105.14 (Page 1968).

Section 2-109 Meaning of Child and Related Terms.

If, for purposes of intestate succession, a relationship of parent and child 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 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.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participate in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subparagraph (ii) is ineffective to 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.

With respect to adopted persons, the Uniform Probate Code is very similar to present Ohio law. The proposed Code provides that, for purposes of inheritance by, through, or from a person, an adopted child is treated as the child of the adopting parent and not of the natural parents, and the Ohio statute agrees.[74] The Uniform Code, however, does not contain the provision found in the Ohio statute[75] which bars the adopted child from inheritances that are limited to the heirs of the body of the adopting parents. Nor does the Code follow that part of the Ohio statute[76] which allows the adopted child to inherit under a will of a natural relative if the will identifies the child by any known name or by other clear identification.[77] However, these differences should not affect present Ohio law: in the former situation the phrase "heirs of the body" connotes a biological relationship to the parents which would seem to exclude adopted children; in the latter it would also seem that since any person, stranger-to-the-blood or relative, may take under the will of the testator, the natural relative who has been adopted could also take, as any stranger can, so long as he is clearly identified. Thus, the adoption statute which cuts off the adopted person's right to inherit by intestate succession would not affect the right of a testator to leave his property to those he chooses.

Both the Ohio statute and the Code provide for the situation in which the spouse of a natural parent adopts the stepchild; the rights of the natural parent who is the spouse of the adopting parent are not affected.[78] Conversely, it would seem by implication that the rights of the adopted

[74] OHIO REV. CODE ANN. § 3107.13 (Page Supp. 1972).

[75] *Id.* § 3107.13(A).

[76] *Id.* § 3107.13(B).

[77] Saintignon v. Saintignon, 5 Ohio App. 2d 133, 214 N.E.2d 124 (1966).

[70] UNIFORM PROBATE CODE § 2-109(1); OHIO REV. CODE ANN. § 3107.13(B) (Page Supp 1972).

child to the other natural parent (the one replaced by the adopting parent), and vice versa, are cut off by the statute. The language of the Uniform Code is 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."[79] One Ohio court has held, however, that a child whose natural parents were divorced, whose mother remarried, and who was then adopted by her stepfather after the natural father's death could inherit from the estate of her grandmother through her natural father.[80] The court's holding stated that in those cases in which the natural parent could not, because of death, ever be given a chance to contest the adoption, the legislature had not intended to sever the child from the natural bloodlines.[81] In dictum, the court further stated that the rule would be the same whether the natural parent who was not a party to the adoption died prior to or after the adoption.[82] It is not clear how the adoption of the proposed Code would affect this interpretation of the Ohio law.

There is at least one other situation that the Code provision leaves ambiguous: should a child be adopted a second time, it is not clear whether he may be entitled to inherit from both sets of adopting parents, or vice versa.[83] The Uniform Code ought to be modified to make it clear that, in the case of multiple adoptions, the child is to be considered the child of only his most recent adoptive parents.[84]

With respect to illegitimate children, both the Uniform Probate Code and the relevant Ohio statute[85] provide that they may inherit from and through the mother. The Ohio statute[86] provides alternative methods for establishing paternity if the child is treated as the child of the father. One of these methods is for the father to marry the mother and acknowledge the child as his own. This differs from the Uniform Code provision which establishes paternity of the natural father solely by his marriage to the mother.[87] The proposed Code is silent, however, as to whether the natural father must acknowledge the child as his. This failure to require acknowledgment by the father leaves unresolved the situation in which a man marries the mother of an illigitimate and does not acknowledge the child as his own, but his wife claims that it is his; in such a case the Code does not specifically decide whether or not the child is to be considered legitimate. The Code should be modified either to make it clear that the

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[79] UNIFORM PROBATE CODE § 2-109(1) (emphasis supplied).

[80] First Nat'l. Bank v. Collar, 27 Ohio Misc. 88, 272 N.E.2d 916 (C.P. 1971).

[81] *Id.* at 91-92, 272 N.E.2d at 918-19.

[82] *Id.* at 92, 272 N.E.2d at 919 (dictum).

[83] *See* Holmes v. Curl, 189 Iowa 246, 178 N.W. 406 (1920). The court allowed a twice-adopted child to inherit from the former adoptive parents.

[84] O'Connell & Effland, *supra* note 11, at 219.

[85] OHIO REV. CODE ANN. § 2105.17 (Page 1968).

[86] *Id.* § 2105.18.

[87] UNIFORM PROBATE CODE § 2-109(2)(i).

father must acknowledge the child as his, or devise a procedure for defining and determining the identity of the natural father.[88]

Both Ohio and the Code provide that the issue of void marriages are legitimate.[89] Both statutes also provide a procedure for adjudicating the paternity of the natural father, the second alternative method for establishing paternity under both statutes. In Ohio the natural father may legitimize the child without a marriage to the mother by filing an application in the appropriate probate court acknowledging the child as his.[90] If the mother (or the guardian if it is someone other than the mother) consents to the establishment of the relationship, and the court both finds that it is in the best interest of the child to do so and is satisfied that the applicant is in fact the natural father, then it may enter a decree establishing the legal relationship of parent and child. This will be the same relationship as though the child were born to the father of a lawful marriage. The proposed Code also allows paternity to be established by an adjudication, either before the death of the natural father or by clear and convincing proof after his death.[91] The Ohio statute makes no provision for the establishment of the relationship after the death of the father.

The Code contains an exception to the general rule that a child who has been legitimized, by whatever procedure, is treated the same as the child who is born of a lawful marriage. If paternity is established under the adjudication procedure, neither the father nor his kindred are qualified to inherit from or through the child unless the father has openly acknowledged him and has not refused support.[92] The purpose of this provision would seem to be to encourage a father to acknowledge and support his natural children; if he has failed to do so, it would seem inequitable to allow him to share in the child's estate.[93]

> Section 2-110 Advancements.
>
> If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into ac-

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[88] Section 2-109(2)(i) provides that the child is legitimate only if the "natural parents" are married either before or after the birth of the child. It does not provide a means for determining who the natural father is if he fails to acknowledge the child as his own after marrying the mother. *See* Comer v. Comer, 175 Ohio St. 313, 194 N.E.2d 572 (1963); Eichorn v. Zedaker, 109 Ohio St. 609, 144 N.E. 258 (1924).

[89] UNIFORM PROBATE CODE § 2-109(2)(i); OHIO REV. CODE ANN. § 2105.18 (Page 1968).

[90] OHIO REV. CODE ANN. § 2105.18 (Page 1968).

[91] UNIFORM PROBATE CODE § 2-109(27)(ii).

[92] *Id.* § 2-109(2)(ii).

[93] O'Connell & Effland, *supra* note 11, at 221.

> count in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

The generally accepted rule on advancements is: if an intestate makes a substantial gift to one of his children, the gift is presumed to be an advancement, and the value of the gift shall be deducted from the child's share of the intestate's estate upon distribution in order to equalize the shares of the other children or their descendents.[94] In Ohio an advancement to a child or his descendents is deducted from the child's intestate share of the parent's estate,[95] and whether a transfer is an advancement or not depends upon the intent of the donor at the time that he makes the transfer.[96] This section of the Uniform Code would effect a major change in the Ohio doctrine of advancements. The present Ohio statute limits the doctrine to children of the intestate or their descendents, while the Code applies the doctrine to the much broader class of heirs of the intestate. The Code, for example, would apply to advancements made to collateral heirs, such as nephews and nieces, as well as to lineal descendants. Ohio, on the other hand, does not apply the doctrine to collateral heirs.[97] The Uniform Probate Code limits the application of the doctrine to those cases in which there is a contemporaneous writing by the decedent stating that the gift is intended to be an advancement, or an acknowledgment in writing from the heir indicating that the gift is intended as an advancement. The proposed Code does not apply the doctrine if there is only partial intestacy, while the doctrine would apply in Ohio should a parent die intestate, either in whole or in part, survived by children or their descendants.[98]

The reason given for this major change from the traditional and majority view[99] is that today most *inter vivos* transfers are intended to be absolute gifts and not advancements, or alternatively are explicitly integrated into the decedents total estate plan.[100] In our affluent society this is, in all probability, true in the vast majority of cases. At the time the doctrine of advancements developed, and until recent years, most persons did not accumulate enough wealth to make absolute gifts not intended to be treated as advancements. Because the original reason underlying this doctrine is no longer valid, it is senseless to continue the rule; thus the Uniform Probate Code has limited it to those cases in which the donor's intent is actually shown in the form of the contemporaneous writing by the donor or

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94 T. Atkinson, *supra* note 70, at 716; Shehy v. Cunningham, 81 Ohio St. 289, 90 N.E. 805 (1909).

95 OHIO REV. CODE ANN. § 2105.05 (Page 1968).

96 T. Atkinson, *supra* note 70, at 719-22.

97 Stewart v. Yeazell, 4 Ohio App. 82, 21 Ohio C.C.R. (n.s.) 357, 25 Ohio C. Dec. 318 (1914).

98 Dittoe v. Cluney, 22 Ohio St. 436 (1872).

99 T. Atkinson, *supra* note 70, at 716 n.3.

100 UNIFORM PROBATE CODE § 2-110, Comment.

acknowledgment by the donee. By requiring the writing, the Code has done much to eliminate the uncertainties in proof by parol evidence that have always persisted in most determinations of whether or not an advancement was intended.

An additional issue which will also change Ohio law is whether or not an advancement to a predeceased child of an intestate is to be charged against the share the predeceased child's children receive by representation. The Supreme Court of Ohio has held that the statute requires that an advancement made to a deceased child be charged against the share the deceased child's children receive. "[T]he legislature had in view the equality of inheritance which is made prominent in the general scope of the statutes, and that it intended, for the purpose of attaining it in cases of this character, that the 'portion' of the deceased child should be charged with an advancement made to him, though the portion should be inherited by his representatives."[101] The Uniform Code takes the opposite approach: an advancement is not to be taken into account in computing the share of the descendents, unless provided to the contrary in the written declaration of the decedent or by the written acknowledgment of the predeceased child.

> Section 2-111 Debts to Decedent.
>
> A debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue.

When an heir is indebted to an intestate decedent, the weight of authority[102] requires that the debt be deducted from the heir's share of the estate. Both Ohio and the Code have adopted[103] this common law doctrine of equitable set-off.[104] The Code, following the majority view,[105] does not charge the debt against the intestate share of anyone except the debtor; if the debtor does not survive the decedent, the debt is not taken into account in computing the share the debtor's representatives receive. This is contrary to the view presently taken in Ohio which holds that, in light of the statutory provisions[106] requiring that the lineal descendents of a deceased child take the share in equal parts, their parent would have been entitled to take had he been living; the debtor's children, if they are taking by representation and not *per capita*, are entitled to take the share subject to the debts of their parent[107] if the debt is not barred by the statute of

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101 Parsons v. Parsons, 52 Ohio St. 470, 487, 40 N.E. 165, 166 (1895).

102 T. Atkinson, *supra* note 70, at 787.

103 OHIO REV. CODE ANN. § 2113.59 (Page 1968).

104 Russell v. Rexroad, 16 Ohio Op. 209, 30 Ohio L. Abs. 450 (P. Ct. 1939).

105 T. Atkinson, *supra* note 70, at 790.

106 OHIO REV. CODE ANN. § 2105.13 (Page 1968).

107 Gruhler v. Hossafaus, 93 Ohio L. Abs. 71, 195 N.E.2d 387 (P. Ct. 1963).

limitations.[108] Thus the adoption of the Code by Ohio would change the Ohio law and would be beneficial in avoiding litigation on this problem.

Section 2-112 Alienage.
No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

Neither the Code nor the applicable Ohio law[109] place any restrictions on the ability of an alien to inherit property. In Ohio, an alien has the same rights of inheritance as does a citizen of Ohio or of the United States. In light of the Supreme Court's decision in *Zschernig v. Miller*,[110] however, state retention statutes[111] such as Ohio's, which direct that funds in a decedent's estate which would otherwise be distributable to the beneficiaries or heirs, be held in trust if it appears that the distributee resides in a country where he will be prevented from having the benefit, use, or control of the property due him, are invalid under the constitutional[112] provision which places exclusive power over foreign affairs in the federal government.[113] It would thus be appropriate for the Ohio legislature to repeal the retention statute pursuant to the Supreme Court's decision in *Zschernig*.[114]

Section 2-113 Dower and Curtesy Abolished.
The estates of dower and curtesy are abolished.

This section of the proposed Uniform Code would abolish the remaining vestiges of dower in Ohio.[115] Present law provides for an inchoate dower interest in either spouse which is terminated upon the death of the spouse, except as to property which is: (1) conveyed by the deceased spouse during the marriage; or (2) encumbered or aliened by the deceased spouse during the marriage, the surviving spouse not having been barred from dower under one of the statutory provisions,[116] nor having voluntarily relinquished the interest. Common law dower and its counterpart, curtesy, were designed to give appropriate rights to a surviving spouse in an

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[108] Summers v. Connolly, 159 Ohio St. 396, 112 N.E.2d 391 (1953).

[109] OHIO REV. CODE ANN. § 2105.16 (Page 1968).

[110] Zschernig v. Miller, 389 U.S. 429 (1968).

[111] OHIO REV. CODE ANN. § 2113.81 (Page 1968).

[112] U.S. CONST. art. I, § 10.

[113] First Nat'l. Bank v. Fishman, 16 Ohio Misc. 185, 239 N.E.2d 270 (P. Ct. 1968).

[114] 389 U.S. 429 (1968). The Supreme Court held unconstitutional an Oregon statute that provided for escheat if a nonresident alien did not meet three requirements: (1) a reciprocal right of United States' citizens to take property on the same terms as citizens or inhabitants of the foreign country; (2) a right of United States' citizens to receive payment here of funds from estates in the foreign country; and (3) a right of the foreign heirs to receive the proceeds of local estates without confiscation by the foreign government. The rationale of the Court was that such a statute constituted "an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and Congress." *Id.* at 432. Th ecourt in the *Fishman* case held the Ohio retention statute (§ 2113.81) invalid on the basis of the *Zschernig* case.

[115] OHIO REV. CODE ANN. §§ 2103.02-.08 (Page 1968). Curtesy has been abolished in Ohio by § 2103.09. The inchoate dower interest applies to both husband and wife.

[116] OHIO REV. CODE ANN. §§ 2103.02(B), .03, .05, .07 (Page 1968).

agricultural society in which the primary form of wealth was land and the primary form of income was rents and profits from land. The widow's dower historically provided the widow the support her husband was obligated to furnish during his life. Curtesy gave the husband the same rights in his wife's land after her death that he had enjoyed while she was alive. In our industrial society the form and nature of wealth and income have changed; dower and curtesy no longer give the protection originally intended.[117] For this reason, most of the states have enacted legislation which gives the surviving spouse the right to elect taking a designated share of the deceased spouse's estate.[118] The major practical effect of the inchoate dower interest that exists in Ohio today is to preclude one spouse from conveying or encumbering real property without the consent of the other. The Uniform Code would eliminate this power,[119] which is a title-searcher's headache and a bothersome cloud upon title. It would seem preferable to abolish all remaining vestiges of dower, because it does not provide the protection originally intended, and it has been supplanted or supplemented in most states, including Ohio, by a statutory forced share. It is, in short, of little more than a nuisance value in dealing with title to real property.

B. *Further Suggestions for Change*

1. Ancestral Property Restrictions and Ohio's "Half and Half" Statute.

The Uniform Probate Code does not adopt the common law doctrine of ancestral property.[120] The doctrine has also been abolished in Ohio,[121] but with an exception[122] that provides for the descent of property which came from a deceased spouse.[123] Unfamiliarity with this statute by the bar and the general public has often resulted in its misapplication. Because of this lack of understanding of the statute's effect, there is often a cloud upon the title of real property and title companies therefore refuse to insure or guarantee title; as a result, property becomes unmarketable.

If Ohio adopts the Uniform Probate Code, the legislature should take that opportunity to abolish the half and half statute in Ohio, thus elimi-

117 W. B. LEACH, CASES AND TEXT ON THE LAW OF WILLS, 17 (2d ed. 1960).

118 OHIO REV. CODE ANN. §§ 2107.39-.45; T. Atkinson, *supra* note 70, at 108-09.

119 The power existing in either spouse to preclude the other from making inter vivos transfers of real property without the consent of that spouse would be supplanted by the provisions for the surviving spouse in Part 2 of Article II; *see* text accompanying notes 137-89 *infra*. Thus the protection against a disinheritance by an inter vivos transfer is still afforded the surviving spouse.

120 J. RITCHIE, N. ALFORD, & R. EFFLAND, DECEDENTS' ESTATES AND TRUSTS 67 (4th ed. 1971).

121 OHIO REV. CODE ANN. § 2105.01 (Page 1968).

122 *Id.* § 2105.10.

123 Hammel v. Hammel, 2 Ohio Op. 73, 3 Ohio Supp. 291 (P. Ct. 1935).

nating a source of confusion and clouds upon title. The statute is also difficult to administer, and particularly if the heirs of the deceased spouse from whom the property came are not readily ascertainable. In all probability the statute is not in accord with the wishes of either the decedents or the heirs who take the property.[124]

2. Ohio's Designation of Heir Statute.

The Ohio Revised Code[125] allows a person to designate an heir at law if certain statutory procedures are followed.[126] The Uniform Probate Code does not have such a provision. Since an adult may not be adopted in Ohio,[127] this provision allows the same end to be accomplished by permitting the designation of a person as an heir.[128] When the prescribed procedure is followed, the person thus designated "will stand in the same relation, for all purposes, to such declarant as he could, if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born."[129] The Supreme Court of Ohio has, in a blatant exercise of judicial legislation, restricted the application of this statute so that the designated heir does not inherit through his designator from relatives by blood of the designator.[130] The court attempts to justify this result by stating that any broader interpretation of the statute would lead to fantastic results. The court thought it would necessarily follow that if the designee could inherit from and through the designator, then the designee would also transmit inheritance to the designator;[131] but the statute requires no such conclusion. The statute speaks of the relationship of the designee to the designator and his

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124 M. Sussman, *supra* note 16, at 141-42.

125 OHIO REV. CODE ANN. § 2105.15 (Page 1968).

126 A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person's acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. . . . After a lapse of one year from the date of such designation, such declarant may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration.
OHIO REV. CODE ANN. § 2105.15 (Page 1968).

127 Only a "child" may be adopted in Ohio under § 3107.02. A "child" is defined as any person under the age of 21 by § 3107.01.

128 OHIO REV. CODE ANN. § 2105.15, Comment (Page 1968).

129 *Id.*

130 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948); *see also* Uhl v. Armstrong, 78 Ohio L. Abs. 592, 140 N.E.2d 60 (Ct. App. 1957).

131 150 Ohio St. at 44, 80 N.E.2d at 498.

relatives. It does not attempt to create the same relationship between the designator and designee in relation to the designee and his relatives. The purpose and history of the statute militate against such a conclusion,[132] and such a result would seem to be unconstitutional as well.[133]

Ohio is in a distinct minority in providing this form of statutory authority.[134] In most states the same result could be achieved by allowing adults to be adopted.[135] Adopting the Uniform Code would provide an excellent opportunity for Ohio to repeal this statute and to amend the adoption statute to allow persons to adopt adults with their consent. This would not only provide desired uniformity, but would also allow the same result to be accomplished.

II. ELECTIVE SHARE OF THE SURVIVING SPOUSE

Statutes in most states preserve for the surviving spouse and minor children certain rights in the property of the decedent that cannot be destroyed by testamentary transfers of the decedent. The right to a family allowance during the administration of the estate, to receive certain exempt property, and to a homestead exemption is universally guaranteed. In addition, some states expressly protect the surviving spouse against disinheritance by the deceased spouse.[136] Children of the deceased spouse, while not protected against intentional disinheritance, are given rights in their parents' estate if it appears that they were unintentionally omitted from the will. The Uniform Probate Code concurs in the protections provided for the surviving spouse and children by Ohio law, but with some substantive variations on it. Part 2 of Article II, in the words of the official comment, is "designed to protect a spouse of a decedent who was a domiciliary against donative transfers by will and will substitutes which would deprive the survivor of a fair share of the decedent's estate."[137]

No part of the proposed Code is likely to generate as much controversy as Part 2.[138] The elective share concept is a direct descendent of common law dower and curtesy. Over the years changes in society have shifted economic emphasis away from agriculture as the primary source of wealth to an industrial and commercial society in which wealth is represented primarily by personal property. As the ancient rights of dower and curtesy ceased to provide the necessary protection, states provided the elective

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132 OHIO REV. CODE ANN. § 2105.15, Comment (Page 1968).

133 *See* Davis v. Laws, 27 Ohio N.P. (n.s.) 193 (C.P. 1928).

134 Southern Ohio Savings Bank & Trust Co. v. Boyer, 66 Ohio App. 136, 31 N.E.2d 161 (1940).

135 2 AM. JUR. 2d *Adoption* § 11 (1962).

136 T. Atkinson, *supra* note 70, § 32.

137 UNIFORM PROBATE CODE, Article II, Part 2, General Comment.

138 "Almost every feature of the system described herein is or may be controversial." *Id.*

share to take its place. In some cases the elective share was in addition to the right to dower; in others it was wholly a substitute.[139]

The elective share, however, has proven inadequate for providing the surviving spouse with the intended protection. In many states today a husband can, by *inter vivos* transfers, divest himself of title to his property in such a way as to deprive his spouse of her statutory share. So long as the conveyance is not "illusory,"[140] most states have held the transfers valid, regardless of the fact that they were made with the clear purpose of defeating marital rights. The present state of the law in this area is for the most part unsatisfactory. Courts have been groping for solutions which will permit a property owner to convey his property to others in good faith, yet at the same time give his spouse some protection against gratuitous *inter vivos* conveyances that are used to reach a result not allowed through a testamentary instrument.[141] Courts have developed a variety of theories[142] for giving some relief to the disinherited spouse. Some courts have held that such a transfer works a fraud upon the marital rights if the transfer were made to deprive her of those rights,[143] while other courts have indicated that the transfer is "illusory" as to the spouse, but is not otherwise invalid.[144] The majority of courts have held, however, that if the conveyance is not "a mask for the effective retention"[145] of the property, the conveyance is valid and the property cannot be reached by the surviving spouse, as it is not a part of the probate estate. Conversely, though, an elective share based solely on the probate estate can operate unfairly in favor of the surviving spouse. The husband who provides for his wife by the use of life insurance, by an *inter vivos* trust, or by holding his property with her as a joint tenant with rights of survivorship, may have his testamentary plans upset by her electing to take the statutory forced share. The Uniform Probate Code has attempted to deal with both of these problems. The elective share applies to both probate and nonprobate transfers and

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[139] *See generally* T. Atkinson, *supra* note 70, § 29 at 104-06; 1 AMERICAN LAW OF PROPERTY §§ 5.1-.49, 5.57-.74 (A. Casner ed. 1952); 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 209 at 140 *et seq.* (1971); 2 H. TIFFANY, THE LAW OF REAL PROPERTY §§ 487 *et seq.* (3d ed. 1939).

[140] Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).

[141] T. Atkinson, *supra* note 70, at 113-17; Dick v. Bauman, 73 Ohio App. 107, 55 N.E.2d 137 (1943).

[142] *See* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960) for an analysis of these theories.

[143] T. Atkinson, *supra* note 70, at 114 n.8.

[144] Harris v. Harris, 147 Ohio St. 437, 72 N.E.2d 378 (1947). *Harris* was expressly overruled by the Supreme Court of Ohio in Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 503, 179 N.E.2d 60, 69 (1961). "We reject the rule of the *Bolles* and *Harris* cases, to the effect that, if a settlor reserves to himself the income during life, with the right to amend or revoke the trust . . . such reserved rights . . . defeat the parting with dominion . . . and thereby create a right in the widow . . . ." *Id. See also* Purcell v. Cleveland Trust Co., 6 Ohio App. 2d 235, 217 N.E.2d 876 (1965).

[145] Newman v. Dore, 275 N.Y. 371, 381, 9 N.E.2d 966, 969 (1937).

takes into account provisions made for the spouse outside of the testamentary scheme through the application of the "augmented estate"[146] concept.

> Section 2-201 Right to Elective Share.
> (a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.
> (b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Under this section, the surviving spouse, rather than the probate court or the personal representative of the decedent, has the burden of asserting an election to take under the will or the statutory forced share.[147] Under Ohio law the burden of issuing the citation to the surviving spouse rests with the court or personal representative. If, under the Code, the surviving spouse chooses to waive the will and take the forced share, the elective share is one-third of the augmented estate; in Ohio, however, the spouse takes the share to which he or she is entitled under the statute of descent and distribution, with a maximum limitation of one-half of the net estate.[148]

Subsection (b) is also different from present Ohio law. This subsection provides that the law of the decedent's domicile governs the right of the surviving spouse to take an elective share of property in this state. Under the Ohio statute

> *the surviving spouse*—not only the surviving spouse of a testator who was domiciled in Ohio at the time of his death, but also the surviving spouse of a testator who was not domiciled in, but owned property in, Ohio, and whose will has not previously been admitted to probate . . . has the right . . . to elect whether to take under his deceased spouses' will or under the statute of descent and distribution.[149]

This is true regardless of whether, under the law of the state of domicile, the surviving spouse would be entitled to make an election or not. In the *Gould* case the decedent and her surviving spouse were domiciled in Bermuda, where the surviving spouse had no right of election. Thus, if the Code is adopted in Ohio, the law of the surviving spouse's domicile, and not Ohio law, would govern a determination of the right to make an election. This provision will have slight impact, however, should the Code be adopted by most states.

> Section 2-202 Augmented Estate.
> The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemp-

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[146] UNIFORM PROBATE CODE § 2-202.

[147] *Id.*, Article II, Part 2, General Comment.

[148] OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1971).

[149] *In re* Gould's Estate, 75 Ohio L. Abs. 289, 297, 140 N.E.2d 793, 800 (P. Ct. 1956).

tions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

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

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

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

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

(2) Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annunity, or pension payable to a person other than the surviving spouse.

(3) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includable in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds or insurance (including accidential death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer,

his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.[150]

The official comment states that the purposes of the augmented estate concept as used in computing the elective share of the surviving spouse are:

(1) to prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and,

(2) to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements.[151]

Both of these stated purposes conflict with present Ohio law. In the first situation, Ohio courts have held that the owner of property can make arrangements to transmit it to others outside of probate, which will defeat the rights of the surviving spouse to a statutory share of that property.[152] Under § 2-202 of the proposed Code, there are four situations in which transfers made "*during marriage*"[153] by a decedent to a person other than the surviving spouse are brought into the augmented estate for the purpose of determining its size; in Ohio, property transferred in none of these four situations would be considered part of the decedent's estate for purposes of the forced share. The Ohio courts have held that a decedent may retain, at the time of his death, the possession, enjoyment or right to income from his property,[154] as well as the power to revoke.[155] Ohio law also provides that the rights of parties to joint and survivorship property are based

[150] The Joint Editional Board has reorganized this section by placing the paragraph now numbered as § 2-202(2) as an unnumbered paragraph under § 2-202(1), and renumbering subsection (3) as § 2-202(2). 3 UNIFORM PROBATE CODE NOTES 4 (Dec. 1972).

[151] UNIFORM PROBATE CODE § 2-202, Comment.

[152] Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961); Neville v. Sawicki, 146 Ohio St. 539, 67 N.E.2d 323 (1946).

[153] Only transfers made during the marriage are included. Thus a decedent could provide for issue of a prior marriage by life insurance or a revocable inter vivos trust without fear of these provisions being upset by a subsequent marriage. UNIFORM PROBATE CODE § 2-202, Comment.

[154] UNIFORM PROBATE CODE § 2-202(1)(i).

[155] *Id.* § 2-202(1)(ii); Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961).

entirely upon the contract and would not be subject to the decedent's testamentary estate;[156] neither are dollar or time limitations presently placed upon transfers, so long as the transfer is *inter vivos* and not testamentary in nature.[157]

While the Uniform Code provision is complicated, it is nevertheless an improvement upon most present day statutes because it reduces the possible inequities that may result. The following example illustrates its operation. Suppose first that the decedent testator leaves a net probate estate of $70,000, of which $15,000 is left to his spouse. During his life he transferred personal property into joint ownership with *A* which has a value of $40,000 at his death. Assume also that he opened a savings account in a bank in his name "in trust for *B*," the balance in the account at death being $15,000. The augmented estate would include the probate estate ($70,000), the personal property held in joint ownership with *A* ($40,000), and the "Totten" trust account for *B* ($15,000). Thus the surviving spouse could elect one-third of $125,000, or a share of over $41,000. Against this one-third share would be credited the $15,000 provided for the surviving spouse under the will. The additional $26,000 would come from the other devisees under the will and from *A* and *B* in proportion to the amounts they received.[158]

The second situation covered by § 2-202 provides for an accounting, in the augmented estate, of property the surviving spouse has received from the decedent, either during the lifetime of the decedent or at death, and by any nonprobate arrangements. This is to prevent the surviving spouse from electing a share of the probate estate if the spouse has already received a "fair" share of the total wealth. This property is then deducted from her share of the augmented estate. If, on the same facts as used in the above example, the decedent testator had provided for his spouse by naming her as beneficiary of his life insurance policy in the amount of $50,000, this would be included in the augmented estate, but it would also be charged against the surviving spouse's share. The augmented estate would be increased to $175,000 and the surviving spouse's ultimate share would be over $58,000. Since the surviving spouse has received $15,000 under the will and $50,000 in life insurance proceeds, the elective share would be fully satisfied and the surviving spouse would not be entitled to any of the property passing to the other devisees under the will or to *A* and *B*. Consequently, as a result of this feature, the Code will reduce the number of elections made to cases of express disinheritance.[159] This provision is also

[156] UNIFORM PROBATE CODE § 2-202(1)(iii); Berberick v. Courtade, 137 Ohio St. 297, 28 N.E.2d 636 (1940); Kipp v. Kipp, 60 Ohio L. Abs. 400, 101 N.E.2d 782 (Ct. App. 1970).

[157] UNIFORM PROBATE CODE § 2-202(1)(iv); Smyth v. Cleveland Trust Co., 172 Ohio St. 489, 179 N.E.2d 60 (1961); Purcell v. Cleveland Trust Co., 6 Ohio App. 2d 235, 217 N.E.2d 876 (1965).

[158] O'Connell & Effland, *supra* note 11, at 230.

[159] [I]t is obvious that this section will operate in the long run to decrease substantially

contrary to the Ohio statute which allows that a surviving spouse may take property, such as life insurance, that is outside of the probate estate of the decedent and still elect to take under the law and receive the full statutory share of up to one-half of the probate estate.[160]

There has been substantial criticism of this proposed Code provision on the basis that the evil the statute tries to correct rarely occurs and that the statute, because of its complexity and ambiguities, is an open invitation to litigation.[161] The official comment admits that "[t]he augmented net estate approach embodied in this section is relatively complex and assumes that litigation may be required in cases in which the right to an elective share is asserted."[162] Even so, it seems that it would be preferable to deal with the complexity and litigation rather than to allow the present inequities, both in favor of and against the surviving spouse, to continue.

> Section 2-203 Right of Election Personal to Surviving Spouse.
> The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

Under the Ohio statute,[163] as under the Uniform Code, the right election is personal to the surviving spouse. Ohio also provides for elections to be made when the surviving spouse is under a legal disability.[164] In that case, if the probate court determines that if it serves the best interest of the incompetent surviving spouse, the court may exercise, in the spouse's behalf, the right to elect to take against the will and under the laws of intestacy.[165] The Ohio statute[166] also provides that the death of

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> the number of elections. This is because the statute will encourage and provide a legal base for counseling of testators against schemes to disinherit the spouse, and because the spouse can no longer elect in cases where substantial provision is made by joint tenancy, life insurance, lifetime gifts, living trusts set up by the decedent, and the other numerous nonprobate arrangements by which wealth is today transferred. On the other hand the section should provide realistic protection against disinheritance of the spouse in the rare case where decedent tries to achieve that purpose by depleting his probate estate.

UNIFORM PROBATE CODE § 2-202, Comment.

160 Weller v. Weller, 32 Ohio N.P. (n.s.) 329 (C.P. 1934).

161 Zartman, *supra* note 13, at 421.

162 UNIFORM PROBATE CODE § 2-202, Comment.

163 OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1971); "The election provided by Section 2107.39 for a surviving spouse to choose whether she desires to take under her husband's will or under the statute of descent and distribution is solely for the benefit of the surviving spouse, and where that spouse is under a legal disability the probate court must elect on her behalf the provision which is better for her, considering only her interests." *In re* Estate of Cook, 19 Ohio St. 2d 121, 125, 249 N.E.2d 799, 802, (1969).

164 OHIO REV. CODE ANN. § 2107.45 (Page 1968).

165 *In re* Estate of Callan, 101 Ohio App. 114, 135 N.E.2d 464 (1956).

166 OHIO REV. CODE ANN. § 2113.38 (Page 1968).

the surviving spouse prior to the filing of the court's entry, fixing the terms of payment for property elected to be purchased, is nullified and the spouse's heirs do not succeed to that right.[167]

> Section 2-204 Waiver of Right to Elect and of Other Rights.
>
> The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt propperty and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

This provision is entirely consistent with present Ohio law.[168] If the antenuptial or separation agreement is voluntarily made and fair and reasonable to the parties, it will bar each, upon the death of the other, from all statutory rights of the surviving spouse. The proposed Code stipulates that there must be "fair disclosure" by each spouse as to the extent of their property; similarly, Ohio courts have held that there must be a full disclosure by the parties of the property held by each of them.[169] The fact that a prospective spouse had a reputation of wealth is not enough to charge the other with knowledge of the kind or amount of such wealth.[170] Thus the Ohio courts may construe "fair disclosure" to mean "full disclosure."

Ohio's statute does have a provision not found in the Uniform Probate Code. Under it, in order to attack the agreement waiving rights in the other spouse's estate, the action must be brought within six months of the appointment of the personal representative; otherwise the agreement cannot be attacked on any grounds.[171] The corresponding provision of the Uniform Code does not state whether there is a time limitation for attack-

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[167] Under § 2113.38 of the Ohio Revised Code the surviving spouse is given the right to purchase real and personal property not specifically devised or bequeathed by the decedent, in the following manner: (1) the mansion house and household goods at their appraised value; (2) listed securities at the market price at the time of purchase; and (3) other real or personal property at the appraissed value which does not exceed one-third of the appraised value of the estate, including the mansion house and household goods the spouse has elected to purchase.

[168] OHIO REV. CODE ANN. § 2131.03 (Page 1968).

[169] *In re* Estate of Mosier, 72 Ohio L. Abs. 268, 133 N.E.2d 202 (P. Ct. 1954).

[170] Hawkins v. Hawkins, 89 Ohio L. Abs. 161, 185 N.E.2d 89 (P. Ct. 1962), *aff'd*, 176 Ohio St. 469, 200 N.E.2d 300 (1964).

[171] Burlovic v. Farmer, 96 Ohio App. 403, 115 N.E.2d 411 (1953), *aff'd*, 162 Ohio St. 46 120 N.E.2d 705 (1954). *See also* Osborn v. Osborn, 10 Ohio Misc. 171, 226 N.E.2d 814 (C.P. 1966), *aff'd*, 18 Ohio St. 2d 144, 248 N.E.2d 191 (1969); Cantor v. Cantor, 86 Ohio L. Abs. 452, 174 N.E.2d 304 (P. Ct. 1959).

ing an agreement for lack of fair disclosure. In order to secure title to property within a reasonable time after the death of the decedent, it would be helpful if the proposed Code provided a time limitation for attacking the agreement. However, the next section may be construed to cover this problem.

> Section 2-205 Proceeding for Elective Share; Time Limit.
> (a) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the Court and mailing or delivering to the personal representative a petition for the elective share within 6 months after the publication of notice to creditors for filing claims which arose before the death of the decedent. The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.
> (b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.
> (c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the Court.
> (d) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the Court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.
> (e) The order or judgment of the Court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.[172]

This part of the Code corresponds to Ohio law, but with some minor procedural differences. Under the Ohio statute[173] the surviving spouse must make the election in person before a judge or deputy clerk. Subsection (a) does not seem to require this personal appearance, but rather states only that he or she shall file his petition in the probate court and mail or deliver it to the personal representative of the decedent. The Uniform Code provides a six month time limit for the filing of an election petition from the date of the publication of notice to the creditors, while the Ohio provision has a limit of seven months after the appointment of the personal representatives.[174] Both the Ohio statute and the Code allow for

[172] Section 2-205(a) (line 4) should read "within six months after the *first* publication of notice to creditors." 3 UNIFORM PROBATE CODE NOTES 5 (Dec. 1972).

[173] OHIO REV. CODE ANN. § 2107.43 (Page 1968).

[174] OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1971).

an extension of time upon a showing of good cause.[175] Under the proposed Code the burden of initiating the election is upon the surviving spouse though, while under the Ohio statute the burden is upon the personal representative or, at his failure, upon the court to issue a citation to the surviving spouse to elect to take under the will or under the statute of descent and distribution; this citation is to be issued, in Ohio, after the probate of the will and the filing of the inventory, appraisement, and schedule of debts.[176] The proposed Code further places the responsibility on the surviving spouse for giving notice to other persons interested in the estate of a hearing for the election,[177] but Ohio statutory law has no such provision. In subsection (c), the Code provides that the surviving spouse may rescind his election at any time before entry of a final determination by the court. While there is no specific Ohio statute on point, it would seem that § 2107.43 of the Ohio Revised Code, which requires that the election be made in person, would cover this, particularly in light of the decision of one Ohio court[178] holding that an election could be rescinded if the surviving spouse did not have full knowledge of the condition of the estate. This was allowed even though the election had become final.[179]

> Section 2-206 Effect of Election on Benefits by Will or Statute.
>
> (a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under subsection 2-207(b), as if the surviving spouse had predeceased the testator.
>
> (b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will.

Ohio's law is consistent with subsection (a), as exemplified by what one Ohio court has stated:

> The election of the widow to renounce the provisions of the will made for her and to take under the law did not destroy the efficacy of testator's last will and testament, other than to withdraw therefrom the one-half of the net estate, her interest in the estate established under the provisions of Section 10504-55, General Code, and she is not entitled to have the estate

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175 *Id.*; UNIFORM PROBATE CODE § 2-205(a).

176 OHIO REV. CODE ANN. § 2107.39 (Page Supp. 1971).

177 UNIFORM PROBATE CODE § 2-205(b).

178 Smith v. First Nat'l. Bank, 69 Ohio L. Abs. 102, 124 N.E.2d 851 (C.P. 1954).

179 *See* text accompanying notes 168-71 *supra.*

> administered as to her one-half of the net estate as though there were no will, . . . A taking against the will by a surviving spouse does not operate to render the estate intestate, and is not allowed to break the testamentary plan further than is absolutely necessary . . . but the will is construed as if it contained no provisions for the renouncing spouse, and distribution is made as if he or she had died.[180]

The second sentence of subsection (a) does not have a counterpart in the Ohio Revised Code. Ohio statutes do provide that a bequest or legacy under a will may be refused, and, if so, that it shall pass by the residuary clause if there is one and by intestacy if not.[181] Any competent adult may renounce an interest through intestate succession and the renounced property shall be distributed as if the renouncer had predeceased the decedent.[182] However, one must make a distinction between the surviving spouse's election to take against the will, thus electing to take the statutory forced share (which has frequently been referred to by the courts as "renouncing the will"), and the actual renunciation of a bequest under the will or the intestate share; in the former case one would "renounce the provision of the will" in order to take a greater share of the estate, while in the latter case one takes nothing.

Ohio law agrees with subsection (b).[183] The Ohio courts have held that a surviving spouse may claim both that which is provided for her in the will and the statutory exemptions.[184] If the surviving spouse elects to take under the law (that is, to take against the will), she is also entitled to take the statutory exemption in addition to the amounts she would take as a result of the election.[185]

> Section 2-207 Charging Spouse With Gifts Received; Liability of Others For Balance of Elective Share.
>
> (a) In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in Section 2-202(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.
>
> (b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.
>
> (c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the

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180 *In re* Estate of Ellis, 66 Ohio App. 121, 126-27, 32 N.E.2d 23, 26 (1940).

181 OHIO REV. CODE ANN. § 2113.60 (Page 1968).

182 *Id.* § 2115.16.

183 *In re* Estate of Fetzer, 71 Ohio L. Abs. 275, 130 N.E.2d 732 (Ct. App. 1954).

184 *Id.*

185 Schardt v. Prexler, 45 Ohio L. Abs. 119, 67 N.E.2d 549 (Ct. App. 1946).

> surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

Subsection (a) of the Code differs from present Ohio law.[186] In Ohio the statutory allowances would be set aside first and can equal 20 percent of the estate up to a maximum of $2,500.[187] In determining the surviving spouse's statutory forced share no consideration is given, in Ohio, to gifts made to the surviving spouse by the decedent during his lifetime. Under the proposed Code,[188] on the other hand, such gifts would be included in the augmented estate to determine the elective share, thereby reducing the amount that other beneficiaries would not receive because it was needed to satisfy the surviving spouse's elective share. With respect to subsection (b), Ohio's position is typified by the following:

> [I]n the absence of a showing that the testator intended that the effect of an election of a surviving spouse to take against the will should be borne to the contrary, that when the election results in the executor being deprived of property, or interests in property, to such extent and in such manner, that the property, or interests in property remaining available for distribution to different classes of legatees named in different items of the will would, if so distributed, cause the reduction resulting from said election to be borne equitably, but not necessarily equally or proportionately, between said classes, distribution shall be made accordingly without further adjustment or contribution between the classes.[189]

Ohio has no statutory provision comparable to subsection (c), but it would seem that much the same principles are also applicable in Ohio.[190]

III. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

Section 2-301 Omitted Spouse.

> (a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.
>
> (b) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

Ohio has no statute comparable to this. In Ohio, the omitted spouse would have no alternative but to elect to take the statutory share against

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186 OHIO REV. CODE ANN. § 2115.13 (Page 1968).

187 *Id.*

188 UNIFORM PROBATE CODE § 2-207(a).

189 Blackford v. Vermillion, 107 Ohio App. 26, 31, 156 N.E.2d 339, 343 (1958).

190 *Id.*

the will. The Uniform Code treats the omitted spouse in the same manner as a pretermitted child and provides an intestate share for him or her, but this provision is only applicable in those cases in which the testator has married after the execution of the will. If the will were executed after the marriage it is presumed that the omission was intentional, and the surviving spouse must then rely upon the elective share provision.[191] The official comment states that the effect of this provision is to reduce the number of cases in which the spouse claims an elective share.[192]

The Uniform Code has adopted a liberal rule on the admission of extrinsic evidence to show that a transfer is intended instead of a testamentary provision.[193] Statements of the testator will be admissable to show his intent. This same evidence would be inadmissable in Ohio since the testator's intent can only be determined from the "four corners" of the will.[194] While this liberal rule opens the door to the admission of parol evidence, it is more likely that the testator's true intent will be ascertained and fulfilled.

> Section 2-302 Pretermitted Children.
>
> (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator has died intestate unless:
>
> (1) it appears from the will that the omission was intentional;
>
> (2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or
>
> (3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.
>
> (b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.
>
> (c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

The Uniform Code's provision for the pretermitted child is similar to the Ohio statutory provision[195] with some variations. Under the Ohio statute the share given to the surviving spouse is excluded from the abatement in making up the intestate share of the pretermitted child.[196] If, for exam-

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191 UNIFORM PROBATE CODE § 2-301(a).

192 *Id.* § 2-301, Comment.

193 O'Connell & Effland, *supra* note 11, at 236.

194 Third Nat'l. Bank & Trust Co. v. Davidson, 157 Ohio St. 355, 105 N.E.2d 573 (1952).

195 OHIO REV. CODE ANN. § 2107.34 (Page 1968).

196 *Id.* § 2107.34 provides in relevant part that:

> [U]nless it appears by such will that it was the intention of the testator to disinherit

ple, the testator has a wife and three children (alive at the time the will was executed) and in his will leaves one-half of his estate to the wife and one-sixth to each of the three children, the pretermitted child born after the execution of the will would take his share by an abatement of the share of the other children, the wife's share being excluded. Thus, the wife would still take her one-half and each of the children would now take a one-eighth share. Under the Uniform Code,[197] if the testator has children when the will is executed, and he devises substantially all of his estate to the other parent of the omitted child, then such omitted child is not entitled to a share. If, however, he has divided his estate in the manner of the above example, it would seem that the omitted child is entitled to abatement from all, including the surviving spouse. But subsection (c) states that shares are to abate as provided by § 3-902, which excludes from abatement the share of the surviving spouse who elects to take an elective share, and neglects to state whether her share is excluded from abatement if she chooses to take her share under the will. Presumably it is not. Subsection (b) of § 3-902 does provide, however, that "if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator."[198] Thus consideration must be given to the purpose of the testator in providing his testamentary scheme. The official comment states that "even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is *in loco parentis*, are to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies."[199]

It would seem then that present Ohio law would be changed and the surviving spouse's share would be subject to abatement, at least to the extent that the share was not only greater than her elective share, but also not substantially all of the estate. If, however, this would defeat the testamentary plan or the purpose of the testator then his intent is to govern.[200] The Uniform Code[201] also raises another unresolved question in the use of the phrase "to the other parent." Must the gift to the parent be outright? Would the typical trust arrangement for the benefit of the surviving spouse

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such pretermitted child or heir, the devises and legacies granted by such will, except those to a surviving spouse, shall be abated proportionately . . . so that such pretermitted child or heir will receive a share equal to that which such person would have been entitled to receive out of the estate if such testator had died intestate with no surviving spouse, owning only that portion of his estate not devised or bequeathed to or for the use and benefit of a surviving spouse.

[197] UNIFORM PROBATE CODE § 2-302(a)(2).

[198] *Id.* § 3-902(b).

[199] *Id.* § 3-902, Comment.

[200] *Id.* § 3-902(b).

[201] UNIFORM PROBATE CODE § 2-302(a)(2).

meet this requirement to effectively bar a share to the pretermitted child?[202] If it does not, then it would seem that this clause is too restrictive.

Subsection (a)(3) is similar to present Ohio law. It states that if the testator provided for the child by transfers outside the will and intended these transfers to be in lieu of a testamentary provision, then the child does not take a share under the will. Under the Ohio statute[203] any portion of the testator's estate that the child received by means of an advancement, whether he is pretermitted or not, is charged against his share. Of course, one of the most difficult problems here has been the evidentiary problem of determining the testator's intention. The Uniform Code provides a more liberal rule by allowing "statements of the testator"[204] to show that non-testamentary provisions were intended in lieu of provisions under the will. While there is some danger that the will might be varied by introducing extrinsic evidence to prove the decedent's intent, it is more likely that his actual intent will be honored under the Uniform Code. Although the official comment states that "this section is not intended to alter the rules of evidence applicable to statements of a decedent;" there is some question with respect to whether it in fact does so.[205]

Subsection (b) provides for that rare case in which the testator fails to provide for a living child because he believes him to be dead. The Ohio statute has a more exhaustive provision,[206] to cover the case in which the lineal descendants of that child are provided for by the testator. In that case the omitted child takes the portion his lineal descendants would have taken.[207]

IV. EXEMPT PROPERTY AND ALLOWANCES

This section deals with the rights which are preserved for the surviving spouse and minor children. These rights are protected not only against unsecured creditors but also against attempts of the decedent to defeat them in his will. These provisions for the protection of the family have a limited dollar value. The official comment states that these are only suggested amounts, and it is left to the states adopting the Uniform Code to alter the dollar amounts or to vary the terms and conditions in other ways necessary to accommodate local traditions.[208] In addition, the Code limits these rights to families of a decedent who are domiciled within the state.

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202 Zartman, *supra* note 13, at 424.

203 OHIO REV. CODE ANN. § 2107.34 (Page 1968).

204 UNIFORM PROBATE CODE § 2-302(a)(3).

205 Zartman, *supra* note 13, at 424.

206 OHIO REV. CODE ANN. § 2107.34 (Page 1968).

207 *Id.*

208 UNIFORM PROBATE CODE, Article II, Part 4, General Comment.

Section 2-401 Homestead Allowance.

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

The Uniform Code limits the homestead allowance to families of domiciliary decedents,[209] whereas the Ohio statutes are silent on whether the decedent must have been domiciled within the state. However, Ohio case law[210] makes it clear that this is a prerequisite to claiming a homestead exemption under the statute[211] or the money consideration in lieu of the homestead exemption.[212] The Uniform Code also provides for the homestead exemption in terms of a dollar value, although the distribution to the family may be in property rather than in money.[213] Ohio law presumes a homestead in real property[214] but if the real property is sold to pay a lien which precludes the allowance of the homestead, the excess of the proceeds, not exceeding $500, shall be paid in lieu of the exemption.[215] As a practical matter, the homestead exemption is of minor value in Ohio. This is so because of the unrealistic low dollar limitation[216] in relation to present day property values, and because the real property, even if owned in fee simple, will often be subject to encumbrances that are not included in the exemption. On the other hand, the allowance under the Uniform Code will be equally valuable whether the family residence is owned free of debt, subject to a mortgage or is rental property.[217] If the Uniform Code's suggested dollar amount of $5,000 is adopted by Ohio, the homestead would be of some practical value once again.

The Uniform Code provides that any surviving spouse domiciled in the state is entitled to the homestead allowance. A literal reading of the Ohio statutory provisions[218] would seem to preclude a widower, without an unmarried daughter or unmarried minor son living with him, from claim-

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209 *Id.* § 2-401.

210 Campbell v. Bennington, 4 Ohio C.C.R. (n.s.) 447, 16 Ohio C. Dec. 239 (Cir. Ct. 1904).

211 OHIO REV. CODE § 2329.73 (Page 1954).

212 *Id.* § 2329.76.

213 UNIFORM PROBATE CODE § 3-906(a)(2).

214 OHIO REV. CODE ANN. § 2329.75 (Page 1954).

215 *Id.* § 2329.76 (Page 1954).

216 $1,000 in value or $500 in cash in lieu of the homestead.

217 O'Connell & Effland, *supra* note 11, at 237.

218 OHIO REV. CODE ANN. §§ 2329.09, .73, .75 (Page 1968).

ing the exemption. Ohio courts have held that the right to a homestead exemption applies to every debtor who has a family living with him.[219] Thus it would seem that the Uniform Code would enlarge the class of persons eligible to claim the homestead exemption in Ohio to include a widower who had no family living with him.[220]

Under the Uniform Code the homestead allowance has priority over all claims against the estate. This is in contrast to present Ohio law which designates at least five types of claims that are superior to the homestead exemption.[221] Thus the adoption of the Uniform Code in Ohio would also change present law by giving the homestead exemption priority over all claims—a status it does not now enjoy.

> Section 2-402 Exempt Property.
>
> In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than $3,500, or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the

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219 *In re* Estate of Zerkle, 68 Ohio App. 480, 43 N.E.2d 204 (1941).

220 One Ohio court has held that every surviving spouse is entitled to the homestead exemption, whether or not the qualifying children are living with him. The court's rationale for the holding was that § 2127.26 of the Ohio Revised Code does not restrict the exemptions to surviving spouses living with their families or widows and therefore all surviving spouses, including widowers without families living with them, are entitled to the exemption. *In re* Estate of Barnhiser, 10 Ohio Supp. 117, 25 Ohio Op. 388 (P. Ct. 1943). The *Barnhiser* court treated §§ 2329.73 and 2127.26 as if they were inconsistent acts passed at different times and held that the latter should be followed. It does not seem that the two sections are inconsistent, however, since § 2127.26 expressly limits its application to spouses who are "entitled to have a homestead set off," and § 2329.73 sets out those persons who are entitled to the exemption. Widowers without families living with them are not included within § 2329.73, persons entitled to the exemption. I have been unable to find another Ohio case in which this issue was considered. Ohio Jurisprudence 2d merely states the holding of the *Barnhiser* court without comment; 27 O. JUR. 2d, *Homesteads* § 12 (1957). An article in the Ohio State Law Journal mentions the case, also without comment; *see* Nadler, *Exemptions*, 16 OHIO ST. L.J. 63, 73 (1955).

221 Nadler, *Exemptions*, 16 OHIO ST. L.J. 63, 74 (1955); § 2329.72 provides, in part, that homestead exemptions

> do not extend to a judgment rendered on a mortgage executed by a debtor and his wife, nor to a claim for manual work or labor for less than one hundred dollars, nor to impair the lien by mortgage or otherwise of the vendor for the purchase money of the premises in question, nor the lien of a mechanic, or other person, under a statute of this state, for materials furnished or labor performed in the erection of the dwelling house thereon, nor for the payment of taxes due thereon. . . .

> decedent unless otherwise provided, by intestate succession, or by way of elective share.

The Uniform Code provides that if there is no surviving spouse, the children of the decedent are entitled jointly to the same value ($3,500). The Ohio statute[222] makes no provision for children in situations in which there is no surviving spouse. It does provide, however, that "[e]very person who is the chief support of a family or who is a person paying . . . for the support of a minor child, or is the chief support of any dependent person . . . may hold property exempt . . ."[223] which would seem to have the same effect. The official comment to the Uniform Code states that the exemption is available to adult children if the decedent left no spouse,[224] whereas under present Ohio law adult children are not entitled to this exemption. The Uniform Code also limits the exemption to persons who are domiciled within the state. The Ohio exemption laws have been extended to cover nonresidents as well.[225]

The Uniform Code provides that every surviving spouse is entitled to the exemption. The narrower Ohio statute,[226] which does not cover every surviving spouse, is intended to cover only persons who are heads of families or are supporting other persons or widows.[227] The exempt value of $3,500 under the Uniform Code is considerably greater than that allowed by the Ohio statutes.[228] In Ohio the surviving spouse, or minor children in the absence of the surviving spouse, may select certain property specified by the statute, which is, if selected, neither an asset of the estate nor subject to administration.[229] This property, which includes household goods, farm equipment, automobiles, etc., cannot exceed 20 percent of the appraised value of the estate, with a maximum of no more than $2,500, if there is a surviving spouse, or $1,000 if there is no surviving spouse but minor children, or less than $500 if neither, provided there is that much property in the estate.[230] Both Ohio law and the Uniform Code provide that if the property selected is less than the statutory amount then the persons entitled to the exemption are entitled to a sum of money necessary to

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222 OHIO REV. CODE ANN. § 2329.66 (Page 1954).

223 *Id.*

224 UNIFORM PROBATE CODE § 2-402, Comment.

225 Pittsburgh, C. C. & St. L. Ry. Co. v. Naylor, 73 Ohio St. 115, 76 N.E. 505 (1905); Sproul v. McCoy, 26 Ohio St. 577 (1875); Jacoby v. Dotson, 7 Ohio N.P. 276, 7 Ohio C. Dec. 412 (C.P. 1898).

226 OHIO REV. CODE ANN. § 2329.66 (Page 1953).

227 Diehl v. Friester, 37 Ohio St. 473 (1882); Sears v. Hanks, 14 Ohio St. 298 (1863); Hoover v. Haslage, 5 Ohio N.P. 90, 7 Ohio C. Dec. 98 (C.P. 1897), *aff'd*, 16 Ohio C.C.R. 570, 9 Ohio C. Dec. 404 (1898). *But see* § 2329.62, which covers every person not included in § 2329.66.

228 OHIO REV. CODE ANN. §§ 2115.13 (Page 1968), 2329.66 (Page 1954).

229 *Id.* § 2115.13.

230 *Id.*

make up the difference. Both statutes also provide that exempt property shall have priority over other claims against the estate.[231]

> Section 2-403 Family Allowance.
>
> In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance. The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

Ohio's statutory provision,[232] which provides for a year's allowance to the widow and minor children under the age of 18, is similar to the family allowance provision of the Uniform Code; both provide the right to the family allowance in addition to the homestead and exempt property provisions.[233] The difference is that the Uniform Code requires the decedent to have been domiciled in the state in order for the surviving spouse or minor children to be eligible for the family allowance, whereas under the Ohio statute[234] the widow or children of a nonresident decedent, who dies leaving property in the state and whose will has been admitted to probate in Ohio, may apply for a year's allowance to be set off out of the Ohio property.

Under the Uniform Code all minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to the allowance. The Ohio statutes are more restrictive,[235]

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231 The value of property selected under § 2115.13 shall take priority over the claims of all unsecured creditors of the estate, including funeral expenses and the cost of administering the estate, notwithstanding § 2117.25, which prescribes the order in which debts are to be paid. *In re* Estate of Bremer, 67 Ohio App. 144, 36 N.E.2d 48 (1941).

232 OHIO REV. CODE ANN. § 2117.20 (Page 1968).

233 Schardt v. Prexler, 45 Ohio L. Abs. 119, 67 N.E.2d 549 (Ct. App. 1946), Jacobsen v. Cleveland Trust Co., 6 Ohio Misc. 173, 217 N.E.2d 262 (C.P. 1965).

234 OHIO REV. CODE ANN. § 2117.23 (Page 1968).

235 *Id.* § 2117.20.

limiting the support allowance to widows and children under the age of 18 who need the allowance for their support. The Uniform Code also provides that the family allowance is exempt from, and has priority over, all claims except the homestead allowance, but in Ohio the allowance is treated as a debt of the husband's estate.[236] Furthermore, the Ohio statutory provision[237] which sets out the order in which debts are to be paid lists the allowance third in priority, after the costs of administration and the funeral; however, the allowance is subject and subordinate to claims that judgment lien creditors may have against the proceeds of the sale of real property.[238]

Both Ohio law and the Uniform Code provide that the family allowance is not chargeable against any benefit or share passing to the surviving spouse or children either by the will or by intestate succession, unless the will provides otherwise.[239] However, one Ohio court has held that the widow may be charged for consuming personal property of the deceased out of the widow's allowance.[240] The Uniform Code also expressly provides that the death of any person entitled to the allowance terminates his right to any allowance not yet paid. Ohio courts, however, have held that the right of the widow to the year's allowance vests immediately upon her husband's death.[241] Thus if the widow dies within the 12-month period after the death of her husband and the allowance has not been set off during her lifetime, the allowance must be awarded on the basis of her reasonable support for 12 months, and the allowance or any unpaid balance survives as an asset of her estate.[242] However, if the widow were to die within the statutory period of time under Ohio's survivorship statute,[243] then she would not be entitled to the allowance since the law deems that there is no widow and that no property may be claimed by her personal representative.[244] The year's allowance in Ohio is also terminated as of the date of the marriage of a minor child entitled to such allowance.[245]

> Section 2-404 Source, Determination and Documentation.
>
> If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make

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236 Monger v. Jones, 91 Ohio App. 246, 108 N.E.2d 116 (1949).

237 OHIO REV. CODE ANN. § 2117.25 (Page 1968).

238 Dillman v. Warner, 54 Ohio App. 170, 6 N.E.2d 757 (1935).

239 Jacobsen v. Cleveland Trust Co., 6 Ohio Misc. 173, 217 N.E.2d 262 (C.P. 1965).

240 *In re* Estate of Crouse, 44 Ohio App. 31, 184 N.E.253 (1932).

241 *In re* Estate of Croke, 155 Ohio St. 434, 99 N.E.2d 483 (1951).

242 *Id.*

243 OHIO REV. CODE ANN. § 2105.21 (Page 1968).

244 *In re* Estate of Metzger, 140 Ohio St. 50, 42 N.E.2d 443 (1942).

245 *In re* Estate of Nixon, 5 Ohio Misc. 169, 214 N.E.2d 716 (P. Ct. 1965).

> these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $6,000 or periodic installments not exceeding $500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

The major difference between the Uniform Code and Ohio law is the former's provision setting a maximum limit for the family allowance that the personal representative may determine on his own initiative. In Ohio the year's allowance is to be set off by the appraisers of the decedent's estate or, if they fail to do so or there are no appraisers, then the probate judge may fix the allowance upon motion of the executor or administrator.[246] The Uniform Code establishes the amount that the personal representative may determine at $6,000 for the year. However, the Ohio Revised Code is silent on the amount of the family allowance, stating only that "sufficient provisions or other property to support them for twelve months from the decedent's death"[247] be set off. One Ohio court has held that $4,500 set off for the widow was not excessive, considering the circumstances, even though she could have been maintained at less expense. The court stated that the least amount necessary was not the rule.[248] However, the amount of the year's allowance in excess of $3,000 is subject to the Ohio Estate Tax.[249] The Uniform Code section, which provides that the court on petition from any interested party may increase or diminish the family allowance, is comparable to the Ohio statute.[250] The Uniform Code provides that the allowance is to be "reasonable" to maintain the family during administration,[251] whereas the Ohio provision is that "sufficient provisions" be set off to support the family for 12 months.[252] In making a determination of the amount of the allowance, both the Uniform Code and Ohio courts[253] agree that consideration should be given to such factors as

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246 OHIO REV. CODE ANN. § 2117.20 (Page 1968).

247 *Id.*

248 *In re* Estate of Stump, 89 Ohio L. Abs. 570, 575, 185 N.E.2d 334, 336 (P. Ct. 1962). *See also In re* Estate of Clark, 99 Ohio App. 458, 125 N.E.2d 917 (1955).

249 OHIO REV. CODE ANN. § 5731.03 (Page 1968).

250 *Id.* § 2117.22.

251 UNIFORM PROBATE CODE § 2-403.

252 OHIO REV. CODE ANN. § 2117.20 (Page 1968).

253 UNIFORM PROBATE CODE § 2-403, Comment; *In re* Estate of Croke, 155 Ohio St. 434,

the previous living standards, age and physical condition of persons to be supported, value of the estate, nature of other resources available to the family to meet living expenses, as well as other relevant factors.

Ohio law makes one provision for a surviving spouse that is not found in the Uniform Code. Section 2117.04 provides for the right of the surviving spouse to remain in the family residence free of charge for one year or, if the real estate is sold for the payment of debts, she is to be paid the fair rental value of the unexpired term.[254] Under the Ohio statute this payment has the same priority in the payment of debts as the year's allowance. Despite this difference the need for a similar provision is not as great under the Uniform Code, given the section providing for a homestead allowance.

V. WILLS

Section 2-501 Who May Make a Will.

Any person 18 or more years of age who is of sound mind may make a will.

The Ohio statutory provision[255] is almost identical to the Uniform Code provision: both provide a minimum age of 18 for capacity to execute a will, and both require that the testator be mentally competent. The Uniform Code requires that he be of "sound mind" while the Ohio statute refers to "sound mind and memory."[256] The Ohio statute adds the requirement that the testator not be under any restraint, a restriction not found in the precise language of Uniform Code § 2-501. This Ohio provision refers to restraints imposed upon a testator as a result of undue influence.[257] The Uniform Code provision would not be any change from present Ohio law, however, since the courts would prohibit wills made under undue influence or lack of testamentary capacity whether or not such a "restraint" clause was present.[258]

Section 2-502 Execution.

Except as provided for holographic wills, writings within Section 2-513, and wills within Section 2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least

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99 N.E.2d 483 (1951); *In re* Estate of Clark, 99 Ohio App. 458, 125 N.E.2d 917 (1955); *In re* Estate of Mitchell, 97 Ohio App. 443, 127 N.E.2d 39 (1954); *In re* Estate of Weatherhead, 73 Ohio L. Abs. 524, 137 N.E.2d 315 (P. Ct. 1956).

[254] OHIO REV. CODE ANN. § 2117.24 (Page 1968).

[255] *Id.* § 2107.02.

[256] *Id.*

[257] Cave v. McLean, 66 Ohio App. 196, 32 N.E.2d 581 (1939); Thompson v. Smith, 24 Ohio L. Abs. 82 (Ct. App. 1937); Olney v. Schurr, 21 Ohio L. Abs. 630, *appeal dismissed*, 131 Ohio St. 398, 3 N.E.2d 43 (1936).

[258] T. Atkinson, *supra* note 70, at 233; Green, *Public Policy Underlying the Law of Mental Incompetency*, 38 MICH. L. REV. 1189 (1940).

> 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

With the adoption of this provision, current Ohio law would be changed by eliminating the present requirement that the testator's signature be at the end of the will.[259] Ohio and 12 other states have this statutory requirement, while the majority of states specify no particular place for the testator to sign his will.[260] In these states the courts generally require that a signature located someplace other than the end of the will must be proved as the testator's intended signature and most admit extrinsic evidence to show such intention.[261] The Code has adopted this majority position. Thus if the testator were to write his name in the exordium clause or in the body of the will with the intent that it be his signature, this would satisfy the statute.[262]

In Ohio and other states with statutory requirements that the signature be at the end, the meaning of "end" has caused some difficulty. Some courts have held that the "physical end" of the will is the place intended by the statute, while others have held that the "logical end" is the place intended.[263] The purpose of the requirement has been twofold: (1) to eliminate the necessity of proof of the testator's intention that his signature was to authenticate his will; and (2) to prevent fraudulent additions from being attached to the will.[264] However, in practice these purposes have not always been successfully achieved. First, courts have not eliminated the necessity of proof of intent altogether, as evidenced by the "physical end" versus "logical end" interpretations of the statutes. Secondly, the intended prevention of fraudulent additions can still be frustrated by a testator who executes his will in such a way that there is a considerable blank space left between the dispositive portions of the will and the attestation clause and signature.[265] Thus the precautionary measure of requiring the signature at the end does not always achieve its intended objectives. Since the reasons for the requirement can be so easily thwarted, perhaps the Uniform Code's position of establishing minimal formalities is a better approach.

Both Ohio law and the Uniform Code require that the testator either sign the will or that someone else sign it for him in the testator's presence and at his direction, and that the will be witnessed by at least two persons

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259 OHIO REV. CODE ANN. § 2107.03 (Page 1968).

260 Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 619 (1960).

261 T. Atkinson, *supra* note 70, § 64 n.47.

262 UNIFORM PROBATE CODE § 2-502, Comment.

263 The "logical end" test seems to be the generally accepted view today. *See* Mader v. Apple, 80 Ohio St. 691, 89 N.E. 37 (1909); *In re* Estate of Stinson, 228 Pa. 475, 77 A. 807 (1910).

264 T. Atkinson, *supra* note 70, at 303; 2 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 19.57 (3d ed. 1960).

265 Mader v. Apple, 80 Ohio St., 691, 89 N.E. 37 (1909).

who are either present when the testator signs the instrument or when he acknowledges his signature. In addition, the Ohio statute requires that the witnesses have "attested and subscribed" in the presence of the testator.[266] This requirement has resulted in a considerable amount of litigation in most states to determine the precise meaning of "in the presence of" the testator.[267] Some courts, by applying a strict interpretation, require that the witnesses be within the actual sight of the testator when they sign as witnesses.[268] Other courts have adopted a more liberal approach and use a conscious or constructive presence test which requires only that the witnesses sign within the proximity of the testator and that he be conscious of that fact.[269] The purpose of the statutory provision is to prevent the fraudulent substitution of some other writing for the will of the testator and to make certain that the genuine will is the one which the witnesses sign.[270] There is considerable question as to how much fraud this requirement does in fact prevent. If the witnesses would fraudulently sign a substitute instrument outside of the testator's presence, then would they not also forge his signature? If the witnesses would perjure themselves as to whether the testator's signature was made in their presence, they would be just as willing to swear that they had signed in his presence.[271] Because the requirement has so little utility in the prevention of fraud and carries with it the potential for generating law suits, the Uniform Code has omitted it. The most plausible reason given for the requirement is that it "promotes compactness and solemnity of the execution ceremony;"[272] however, this does not seem to be a sufficient reason for its continuance. Thus the Uniform Code would change the present Ohio requirement that the witnesses be in the presence of the testator when they sign the will. Neither the Uniform Code nor the Ohio statute require that the witnesses sign in the presence of each other;[273] under both statutes the witnesses may sign at separate times and need not see each other sign.

> Section 2-503 Holographic Will.
>
> A will which does not comply with Section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

A holographic will is one that is written wholly in the testator's hand-

266 OHIO REV. CODE ANN. § 2107.03 (Page 1968).

267 T. Atkinson, *supra* note 70, § 72; 2 W. BOWE & D. PARKER, *supra* note 264, §§ 19.119-.126; Evans, *Incidents of Testamentary Execution*, 16 KY. L. J. 199, 200-03 (1928); Smith, *Attestation of Wills—An Examination of Some Problem Areas*, 11 S. TEXAS L. J. 125 (1969); Winston, *Attestation in the Presence of the Testator*, 2 VA. L. REV. 403 (1915).

268 *In re* Predgen's Will, 249 N.C. 509, 107 S.E.2d 160 (1959).

269 *In re* Demaris' Estate, 166 Ore. 36, 110 P.2d 571 (1941).

270 *See* 2 W. BOWE & D. PARKER, *supra* note 264, § 19.120.

271 T. Atkinson, *supra* note 70, at 340.

272 *Id.* at 341.

273 McFadden v. Thomas, 154 Ohio St. 405, 96 N.E.2d 254 (1951).

writing. However, the fact that the will is written in the testator's hand does not dispense with the formalities of execution, except as provided by statute.[274] The majority of states, including Ohio, have no statutes which give the holographic character of the instrument legal effect without the legal formalities of execution.[275] Of the 22 states that do have such statutes, there are significant differences between them. Some states require that the holograph be "entirely"[276] in the handwriting of the testator, while others require only that "the material provisions"[277] and signature be in the testator's handwriting. The reason for this dispensation in those states allowing the holographic will is that the handwritten character of the instrument is a presumptive guarantee of its genuineness and thus a substitute for the normally required witnesses.[278] Even in states in which the statutes require that the instrument be entirely in the testator's handwriting, courts have applied various theories to validate instruments that contain printed or other nonholographic matter. Some courts have used the "intent to embody" theory and disregard the nonholographic matter if they find that the testator did not intend it to be a part of his will; other courts, applying a more liberal approach that may be called the "surplusage" theory, disregard the nonholographic matter if there is a sufficient part of the written matter in the testator's own handwriting.[279] The principal objection to both of these theories is that in varying degrees they disregard the plain meaning of the statute, especially if it requires that the will be wholly in the testator's handwriting.[280]

In keeping with its basic objective of validating the will whenever possible,[281] the Uniform Code has adopted the more liberal surplusage theory approach. Most of the problems that arise over holographic wills deal with their construction rather than their authenticity. The handwritten character of the will dispenses with the necessity of witnesses to insure its genuineness. Many of these construction problems could have been avoided had the testator obtained competent legal advice in drafting the instrument. The law does not require, however, that a testator employ an attorney to advise him in the drafting of an attested will. If there is compliance with the statutory formalities the will is valid regardless of who drafted it. However advisable it may be for one to seek the aid of an attorney, it would certainly be against public policy to require it. Perhaps most testators are more likely to seek advice from an attorney if he cannot

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274 T. Atkinson, *supra* note 70, § 75.

275 Rees, *supra* note 260, at 634.

276 VA. CODE ANN. § 64.1-49 (1950).

277 CAL. PROBATE CODE ANN. § 53 (West 1956).

278 T. Atkinson, *supra* note 70, § 75 at 357.

279 *Id.* at 357-8.

280 *Id.*

281 UNIFORM PROBATE CODE, Article II, Part 5, General Comment.

execute the instrument entirely by himself, as is the case with the holographic will. There is, however, no substantial evidence available to prove this possibility. Therefore, if we are not going to require persons to use attorneys to draft and supervise the execution of attested wills, is there any valid reason why holographic wills should not be allowed? The statutory requirements are intended to protect against fraud, not to require the employment of an attorney. The former objective is achieved in the form of the testator's handwriting in the holograph.

Section 2-504 Self-proved Will.

An attested will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF _____

COUNTY OF _____

WE, _____, _____ and _____, the

testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledged before me by _____,

the testator, and subscribed and sworn to before me by _____,

and _____, witnesses, this _____ day of _____,

_____.
(SEAL)

(Signed) _____

_____
(Official capacity of officer)

Under present Ohio law,[282] before a will can be probated at least two of the witnesses to the will, if available,[283] are required to come before the court to prove that the will was executed in accordance with the requisite formalities. The Uniform Code provides that in cases in which proof of execution is necessary, the testimony or affidavit of at least one witness is required if available, or if not available, the execution may be proven by other evidence.[284] With the self-proved will the Uniform Code introduces a new innovation not presently available in Ohio. The official comment states that the self-proved will "may be admitted to probate . . . without the testimony of any subscribing witness, but otherwise it is treated no differently than a will not self-proved. Thus, a self-proved will 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."[285] Therefore, fraud, forgery, undue influence or lack of testamentary capacity would still be grounds to attack the validity of the will. The self-proving feature would only foreclose a contest on those questions relating to the signing of the will.

> Section 2-505 Who May Witness.
> (a) Any person generally competent to be a witness may act as a witness to a will.
> (b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

Both the present Ohio statute[286] and the Uniform Code[287] require that the witness to the will be "competent." This means that the witness is, at the time of the execution of the will, generally competent to testify in court.[288] Under the common law rule a person who took a gift under the will was an "interested" party and was not competent to testify in court concerning the validity of that will.[289] If there were not the prescribed number of disinterested witnesses, then the entire will was invalidated. To avoid the failure of the entire will when a beneficiary was a witness to it, the Statute of George II[290] was passed. This statute validated the will but nullified the gift in favor of the interested witness. Most American states, including Ohio, have adopted provisions similar to those found in

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282 OHIO REV. CODE ANN. § 2107.14 (Page 1968).

283 *Id.* § 2107.16.

284 This section will only be of significance in formal testacy proceedings under §§ 3-405, 406 because § 3-303(c), dealing with informal probate proceedings, dispenses with the necessity of the testimony of the witnesses even though the instrument is not self-proved. *See* § 2-504, Comment.

285 UNIFORM PROBATE CODE § 2-504, Comment.

286 OHIO REV. CODE ANN. § 2107.03 (Page 1968).

287 UNIFORM PROBATE CODE § 2-505(a).

288 T. Atkinson, *supra* note 70, § 65 at 310.

289 2 J. WIGMORE, EVIDENCE § 575 (3rd ed. 1940).

290 25 Geo. II, c. 6 (1752).

the Statute of George II.[291] Ohio provides that the gift to the witness is void unless the witness would have taken a share of the testator's estate at intestacy, in which case the witness may take as much of that share as does not exceed the amount devised to him in the will.[292] If, for example, the heir-witness would have received one-third of the testate estate of the decedent, he may be a witness and receive a bequest under the will up to that portion of the estate. If his intestate share would be larger than the bequest given in the will, he is then limited to the amount given under the will. If, however, the witness would not have been an heir at law of the decedent, he would take nothing under the will, and thus would be competent to testify on behalf of the will as if the gift had never been made. The Uniform Code provides[293] that the will is not invalidated when signed by an interested witness and changes present Ohio law by providing that the witness does not lose his bequest if he is not also an heir at law. The purpose of this change is not, of course, to encourage the use of interested witnesses, but to avoid the invalidation of a gift in those rare cases in which the witness beneficiary is not also an heir at law of the testator. The fact that a witness receives a substantial portion of the estate would of itself be a suspicious circumstance which could still lead to a challenge of the will on the grounds of undue influence.[294]

Ohio presently allows a person to dispose of his personal property by an oral will if certain requirements are satisfied.[295] However, the Uniform Code does not have a provision recognizing oral wills and, presently, there is considerable doubt as to the need for such a provision. Oral wills were recognized and needed in the past when many people could not read or write and when many had little or no access to legal services. Today, there does not appear to be any rational basis for the continuation of this obsolete method for making a will and it should be abolished.[296] For those persons who wish to dispense with the witnesses required by the formally attested will, the holographic will provides them with a method of so doing.

> Section 2-506 Choice of Law as to Execution.
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> A written will is valid if executed in compliance with Section 2-502 or 2-503 or if its execution complies with the law at the time of execution

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[291] Rees, *supra* note 260, at 629.

[292] OHIO REV. CODE ANN. § 2107.15 (Page 1968).

[293] UNIFORM PROBATE CODE § 2-505(b).

[294] *Id.* § 2-505, Comment.

[295] An oral will, made in the last sickness, shall be valid in respect to personal estate if reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary word. Such witnesses must prove that the testator was of sound mind and memory, not under restraint, and that he called upon some person present at the time the testamentary words were spoken to bear testimony to such disposition as his will. No oral will shall be admitted to record unless it is offered for probate within six months after the death of testator.
OHIO REV. CODE ANN. § 2107.60 (Page 1968).

[296] Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 550 (1948).

> 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.

A problem caused largely by our mobile society may arise in situations in which a testator executes his will in one state and then moves to or purchases real property in another state. The question then arises of whether the will must conform with the requirements for formal execution under the law of the latter to be valid. Both the Ohio statutes[297] and the Uniform Code purport to solve this problem by expanding the validating law to include the law of the place where the will was executed and where the testator was domiciled at the time of death. The Uniform Code provision seems to be broader than the present Ohio statute since it includes as valid, wills that are valid under the law (1) where executed, (2) where the testator is domiciled when the will is executed, (3) where the testator is domiciled at his death, and (4) where the testator has an abode or is a national. The Ohio statute covers two of these situations but it does not mention as valid wills which are valid under the law where the testator is domiciled at execution, or where the testator has an abode or is a national. The official comment states that "[t]he purpose of this section is to provide a wide opportunity for validation of expectations of testators."[298] If and when the Uniform Code is widely adopted, the impact of this section will be minimal.[299] Presently, there may be a few circumstances in which the execution would be valid under the Uniform Code but not under Ohio law; however, these situations would be extremely rare.

> Section 2-507 Revocation by Writing or by Act.
> A will or any part thereof is revoked
> (1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or
> (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

This section of the Uniform Code would result in substantial change to present Ohio law. First, it would allow partial revocation of a will by a physical act done to the instrument. The Ohio statute[300] has been construed as permitting the revocation of the entire will by a physical act; partial revocation by a physical act has not been recognized in Ohio.[301] A second major alteration in present Ohio law would be that the Uniform

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297 OHIO REV. CODE ANN. § 2107.18 (Page 1968).

298 UNIFORM PROBATE CODE § 2-506, Comment.

299 *Id.*

300 OHIO REV. CODE ANN. § 2107.33 (Page 1968).

301 Coghlin v. Coghlin, 79 Ohio St. 71, 85 N.E. 1058 (1908); Griffin v. Brooks, 48 Ohio St. 211, 31 N.E. 743 (1891); *In re* Estate of Downie, 6 Ohio Misc. 36, 35 Ohio Op. 2d 31, 213 N.E.2d 833 (P. Ct. 1966).

Code does not allow for the revocation of a will by the "testator's express written direction"[302]—apart from a subsequent will. Under the present Ohio statute an instrument which does nothing except revoke the will is valid so long as that instrument is executed with the formalities required by the statute, however under the Uniform Code a will can be revoked only by a subsequent will or by a physical act done to the instrument. This leaves unanswered the question of whether a nondispositive instrument can revoke the prior will. Most of the cases indicate that it can.[303] However, the Uniform Code provision does allow a holographic will to revoke a formally executed will, whereas this would not be allowed under the present Ohio law.

The Uniform Code provides that a will may be revoked "by being burned, torn, canceled, obliterated or destroyed with the intent. . . ." while the Ohio statute provides for "tearing, canceling, obliterating or destroying such will with the intention of revoking it . . . ." Both of these provisions use the traditional language found in revocation statutes[304] which has been interpreted by the courts in numerous cases. The official comment[305] states that the section leaves open the question of whether a subsequent will—which has no express revocation clause—is inconsistent with the prior a will so as to revoke the latter, either partially or entirely. In Ohio it is well settled that a will is revoked, even in the absence of an express revocation clause, if the second will is inconsistent with the provisions of the first will, and if the second will is only partially inconsistent with the first will, the first is revoked only to that extent.[306] The comment also states that it should be left to the courts to determine not only whether the physical act was done to the instrument with the requisite intent, but also whether it was of sufficient magnitude so as to revoke the will.[307] This would allow present court interpretations of the statute to remain in effect. The section does not affect present law in regard to the accidental destruction of a will which is later ratified by revocatory intent. This question seems to be unanswered in Ohio.[308]

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302 OHIO REV. CODE ANN. § 2107.33 (Page 1968).

303 Most statutes dealing with wills provide for a nondispositive instrument as a revoking instrument. But if the statute provides only for a revocation by a "subsequent will or codicil," the better view seems to be that revocations unaccompanied by dispositive provisions are permitted. *E.g., In re* Estate of Smith, 31 Cal. 2d 563, 191 P.2d 413 (1948); Kehr Will, 373 Pa. 473, 95 A.2d 647 (1953); Grotts v. Casburn, 295 Ill. 286, 129 N.E. 137 (1920); *In re* Estate of Peirce, 63 Wash. 437, 115 P. 835 (1911). *Contra*, Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1923). *See also* Annot., 22 A.L.R.3d 1346 (1968).

304 Statute of Frauds, 29 Chas. II, c. 3, § VI (1676); Wills Act, 7 Wm. IV & 1 Vict. c. 26, § XX (1837).

305 UNIFORM PROBATE CODE § 2-507, Comment.

306 Hennessy v. Volz, 59 Ohio App. 1, 16 N.E.2d 1019 (1938); Paully v. Crooks, 41 Ohio App. 1, 179 N.E. 364 (1931).

307 UNIFORM PROBATE CODE § 2-507, Comment.

308 *See* OHIO REV. CODE ANN. § 2107.33 (Page 1968).

Section 2-508 Revocation by Divorce; No Revocation by Other Changes of Circumstances.

If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of Section 2-802(b). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. No change of circumstances other than as described in this section revokes a will.

Once again the Uniform Code will change present Ohio law. Ohio's statutory provision provides in part: "This section does not prevent the revocation implied by law, from subsequent changes in the circumstances of the testator."[309] For there to be a revocation implied by law, the Ohio courts have interpreted "subsequent changes in circumstances" to mean a divorce coupled with a full settlement of property rights.[310] Anything less than divorce plus a full property settlement has not been considered to constitute a revocation by the Ohio courts.[311] Under the Uniform Code a divorce or annulment alone would revoke the provisions in the will with respect to the former spouse, regardless of whether or not there was a property settlement. The provision would not operate, however, if the testator is separated but not divorced at his death. A complete property settlement entered into either before or after a separation or divorce does constitute a renunciation of benefits under a prior will, unless otherwise provided by the settlement.[312]

No other change in cirucmstances operates to revoke the will under the Uniform Code. This will modify the rule in some states where a subse-

309 *Id.*

310 Younker v. Johnson, 160 Ohio St. 409, 116 N.E.2d 715 (1954).

[A] divorce, coupled with a full property settlement, is such a subsequent change in the circumstances of the testator that any legacy or bequest in a will executed during marriage for the benefit of the divorced wife is impliedly revoked. . . . But divorce alone, without a separation agreement executed during coverture, does not impliedly revoke a devise or bequest for either one of the divorced parties.

Davis v. Davis, 24 Ohio Misc. 17, 21, 51 Ohio Op. 2d 388, 391, 258 N.E.2d 277, 280, (C.P. 1970).

311 Codner v. Caldwell, 156 Ohio St. 197, 101 N.E.2d 901 (1951); Lang v. Leiter, 103 Ohio App. 119, 144 N.E.2d 332 (1956); Sutton v. Bethell, 97 Ohio App. 52, 116 N.E.2d 594 (1953).

312 UNIFORM PROBATE CODE § 2-204.

quent marriage or a marriage coupled with the birth of a child operates to revoke a will.[313] This would not affect Ohio's law since the Ohio courts have considered neither marriage nor marriage plus birth as a circumstance which would revoke a will by operation of law.[314]

The Uniform Code provision would be a distinct improvement over present Ohio law. Primarily, it seems clear that the Uniform Code is more likely to effectuate the intent of the average testator. In most cases, it is doubtful that the divorced testator would wish to benefit his ex-spouse, and even though most divorces are coupled with a property settlement this provision would govern those cases in which there is no such settlement.[315] The Uniform Code provision protects against inadvertent failure to change the will in those cases. Second, state statutory provisions, including Ohio's,[316] have been justly criticized for introducing an undesirable element of uncertainty into the determination of the validity of a duly executed will.[317] The Uniform Code will remove this uncertainty by clearly stating what circumstances will operate to revoke a will by operation of law.

> Section 2-509 Revival of Revoked Will.
>
> (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.

This provision is very similar to the Ohio law[318] and does not seem to change it. The Uniform Code speaks of revocation of the will "in whole or in part," while the Ohio statute does not make this distinction. However, Ohio courts have stated that "[a] will is revoked by the execution of, and is not revived by the subsequent destruction of, a second will duly executed, when the second will contains an express clause of revocation, or is utterly inconsistent with the provision of the first will; and, further, that, if inconsistent in part with the provisions of the former will, it revokes the former will to that extent . . . ."[319]

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313 *Id.* § 2-508, Comment.

314 M. Sussman, *supra* note 16, at 94-95.

315 Mundy v. Mundy, 15 Ohio C.C.R. 155, 8 Ohio C. Dec. 44 (Cir. Ct. 1897).

316 The Ohio statute does not mention specific situations in which the will is revoked by operation of law; but only subsequent changes in the condition or circumstances of the testator.

317 L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW 83, Comment (1946).

318 OHIO REV. CODE ANN. § 2107.38 (Page 1968).

319 Paully v. Crooks, 41 Ohio App. 1, 7-8, 179 N.E. 364, 367, (1931).

There has been some criticism directed to Section 2-509, contending that it is not only confusing but also fails to provide for the contingency of four or more wills.[320] It is true that the revival problem could have been handled in a more simplified manner, perhaps by following the Ohio provision, however, there does not seem to be a problem as to the fourth or subsequent will. The Ohio statutory provision speaks only of the second will revoking the first and the revocation of the second reviving the first.[321] The Ohio courts have never had a problem in construing the legislature's intent to mean a subsequent will, regardless of whether it was a second, third, fourth, fifth or sixth.[322] The intent of the legislature seems so clear in this regard that it would be difficult to imagine a court using such a literal construction.

> Section 2-510 Incorporation by Reference.
> Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Both the Uniform Code and the Ohio statute[323] allow an extrinsic writing to be incorporated by reference into a will. It is often a convenience, as well as a safeguard against mistake, to refer to an existing document in the will instead of reproducing its content. The testator may, for example, wish to incorporate either an *inter vivos* trust or trust provisions in the will of another person into his own will. Rather than repeat these lengthy provisions, he may simply refer to them in his will and state to what extent they are to govern the disposition of his property. Ohio[324] and the majority of states recognize this doctrine, while a few states prohibit incorporation altogether.[325]

Ohio's statutory provision differs from that of the Uniform Code. Ohio requires that the will refer to the extrinsic writing as being in existence at the time the will is executed,[326] whereas the Uniform Code has deleted this requirement. To qualify for incorporation under the latter, the writing must be in existence when the will is executed, but the will need not refer to it as such. The language used in the will must manifest an intent to incorporate, however, and must describe the writing sufficiently so it can be identified. The Ohio provision also requires that the incorporated mate-

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320 Zartman, *supra* note 13, at 426-27.

321 OHIO REV. CODE ANN. § 2107.38 (Page 1968).

322 Crane v. Tunkey, 11 Ohio L.R. 454, 58 W.L.B. 316 (C.P. 1913); Baily v. McElroy, 89 Ohio L. Abs. 292, 186 N.E.2d 219 (P. Ct. 1962).

323 OHIO REV. CODE ANN. § 2107.05 (Page 1968).

324 Linney v. Cleveland Trust Co., 30 Ohio App. 345, 165 N.E. 101 (1928).

325 T. Atkinson, *supra* note 70, § 80; 2 W. BOWE & D. PARKER, *supra* note 264, § 19.17.

326 Section 2107.05 provides in part: "An existing document, book, record, or memorandum may be incorporated in a will by reference, if referred to as being in existence at the time the will is executed."

rial be deposited with the court when the will is probated or within 30 days thereafter, unless the court grants an extention of time.

> Section 2-511 Testamentary Additions to Trusts.
>
> A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust although the trustor has reserved any or all rights or ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised (1) is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

Frequently a person while living creates a trust and may wish to include additional property in the trust by means of a testamentary disposition. If the will specifies the precise terms of the trust it is clear that the testamentary disposition would be valid.[327] The only question in such a case is whether the trustee can adminster property which the trust receives from the will. Normally, the terms of the trust are not reproduced in the will, and, therefore, they can generally be given effect either on the ground of incorporation by reference, or on the ground that the existing trust is a fact of independent legal significance. Certain questions are not clearly answered under these two doctrines. If the testator relies upon the doctrine of incorporation by reference, and "pours-over" property from his will into a trust which can be amended, and an amendment is made after the execution of the will, the question arises whether the amendment to the trust will invalidate the "pour-over"? Secondly, if the "pour-over" is not invalidated, is the property passing under the will to the trust to be managed according to the terms of the trust that were effective when the will was executed or pursuant to those that were effective when the testator died? Yet, if the independent legal significance doctrine is relied upon, the question arises whether certain inter vivos trusts with minimal trust assets, such

[327] 1 A. SCOTT ON TRUSTS § 54.3 (3rd ed. 1967).

as an unfunded life insurance trust, qualify as an act of independent significance. Finally, when the "pour-over" is valid the question remains whether the "poured over" assets in the trust are subject to statutory provisions governing testamentary trusts.[328]

To resolve these uncertainties a number of states, including Ohio,[329] have enacted statutes which deal with the "pouring over" of property by will into the pre-existing inter vivos trust.[330] The Uniform Code has adopted the Uniform Testamentary Additions to Trust Act. Ohio's statutory provision is substantially similar to this Uniform Act. Under both the Ohio statute and the Uniform Code the "pour-over" is valid if the trust is identified as such in the testator's will, and its terms are set forth in a written instrument or in the last will of a person who predeceased the testator. In either case, it must be executed before or concurrently with the execution of the testator's will. Both statutes provide that the "pour-over" is not invalidated because the trust is amendable or revocable, or because the trust was amended after the execution of the will. Under the Uniform Code the devise is valid, regardless of the existence, size or character of the trust res. The Ohio "pour-over" statute does not mention this, however, and one Ohio court has held that a trust res must exist.[331] The Ohio Statute of Frauds provides that a trust is not invalid because the corpus consists only of the primary or contingent rights to life insurance proceeds or because the assets have a nominal value.[332] Thus, in Ohio the trust res must be in existence even if it only consists of the trustee being a contingent beneficiary under a life insurance contract. The Uniform Code would seem to modify Ohio's present law on this point since there is no such requirement that the res must to be in existence.

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328 O'Connell & Effland, *supra* note 11, at 245-46.

329 A testator may by will devise, bequeath, or appoint real or personal property, or any interest in such property, to a trustee of a trust which is evidenced by a written instrument executed by the testator or any other person either before or on the same date of the execution of such will and which is identified in such will.

The property or interest so devised, bequeathed, or appointed to such trustee shall be added to and become a part of the trust estate, shall be subject to the jurisdiction of the court having jurisdiction of such trust, and shall be administered in accordance with the terms and provisions of the instrument creating such trust, including, unless the will specifically provides otherwise, any amendments or modifications thereof made in writing before, concurrently with, or after the making of the will and prior to the death of the testator. The termination of such trust, or its entire revocation prior to the testator's death, shall invalidate such devise, bequest, or appointment to such trust.

This section shall not affect any of the rights accorded to a surviving spouse under section 2107.39 of the Revised Code.

This section applies to wills executed before October 5, 1961 as well as to wills executed thereafter.

OHIO REV. CODE ANN. § 2107.63 (Page 1968).

330 1 A. SCOTT ON TRUSTS, *supra* note 327, at 409; 2 W. BOWE & D. PARKER, *supra* note 264, § 19.27.

331 Knowles v. Knowles, 4 Ohio Misc. 153, 33 Ohio Op. 2d 218, 212 N.E.2d 88 (P. Ct. 1965).

332 OHIO REV. CODE ANN. § 1335.01(B) (Page Supp. 1971).

Both statutes also provide that "poured-over" property should be administered in accordance with the terms of the trust, including any amendments to the trust made in writing after the initial execution of the will. The Ohio statute limits amendments to those made prior to the testator's death while the Uniform Code extends this provision to include amendments made after the death of the testator if the will so provides. Under both statutes the devised property is not considered to be held under a testamentary trust unless the will provides otherwise.

> Section 2-512 Events of Independent Significance.
> A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

The Uniform Code recognizes the doctrine of "independent legal significance." The doctrine allows a will to dispose of the estate by reference to acts or events that have significance independent of their effect upon the will. For example, a devise "to the person who takes care of me in my last illness," or "to such persons as shall be in my employ at the time of my death," is valid under the doctrine, even though it is necessary to look beyond the will to determine the beneficiary referred to therein. Furthermore, the fact that the testator is also involved in the future act in selecting the property or beneficiary will not necessarily invalidate the bequest. It is clear that a bequest "to the woman I marry" or of "the automobile I own at my death" is valid even though the testator is involved in the nontestamentary act. Since these acts have significance apart from their testamentary effect, the doctrine permits reference to them.[333]

The Ohio statute[334] also recognizes the doctrine of independent legal significance with respect to *inter vivos* trusts;[335] however, the doctrine's application to situations other than those dealing with *inter vivos* trusts is not clear. One Ohio court has held[336] that there must be a trust res in existence at the time of the testator's death in order for a "pour-over" to be made from the estate into the intended trust. The court did not expressly state that the lack of a res kept the trust from having independent legal significance, however such an inference can be made. If this implication is correct it would seem that the doctrine would only be applied in the inter vivos trust situation in Ohio. Since the doctrine was not recognized in

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333 T. Atkinson, *supra* note 70, § 81.

334 OHIO REV. CODE ANN. § 2107.63 (Page 1968); Comment, *Decedents' Estates—Independent Legal Significance and Pour-Over Wills, New Legislation*, 13 CASE W. RES. L. REV. 795 (1962).

335 *See* OHIO REV. CODE ANN. § 2107.63, Comment (Baldwin Supp. 1961).

336 Knowles v. Knowles, 4 Ohio Misc. 153, 33 Ohio Op. 2d 218, 212 N.E.2d 88 (P. Ct. 1965).

Ohio prior to the passage of this statute,[337] it appears that its application would be limited to the trust situation covered by the statute. Therefore, adoption of the Uniform Code would broaden the application of the doctrine to all situations where there are acts or events that have significance apart from their effect upon the dispositions made by the will.

> Section 2-513 Separate Writing Identifying Bequest of Tangible Property. Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

Often times a testator makes reference in his will to a list to be prepared in the future which would dispose of certain property to certain named persons. The majority of courts hold that the list is testamentary and the bequests fail.[338] The list will not qualify under the doctrine of incorporation by reference since it was not in existence at the time the will was executed; furthermore, since the list has no significance other than its testamentary effect of disposing of the testator's property, it does not qualify under the doctrine of acts of independent legal significance.

In keeping with its policy of effectuating the testator's intent and of relaxing the formal requirements of execution, the Uniform Code allows the testator to refer in his will to a separate instrument, including one that was prepared or altered after the execution of the will, which disposes of certain limited types of tangible property.[339] The provision limits the kinds[340] of property that may be disposed of sufficiently to prevent abuse and to justify an exception to the general requirements of testamentary formality. The exception is limited to tangible personal property other than money, evidences of indebtedness, documents of title, and securities and property used in a trade or business. The writing must either be in the hand of the testator or signed by him and must describe the articles and the devisees with reasonable certainty.

Ohio has no statutory provision comparable to this and the Uniform

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337 Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E.2d 381 (1944).

338 T. Atkinson, *supra* note 70, § 81 at n.14.

339 UNIFORM PROBATE CODE § 2-513, Comment.

340 The typical case would be a list of personal effects and those persons whom the testator wished to take these specific items.

Code, therefore, would change present Ohio law. Since the writing need not qualify as being in existence at the time the will was executed, a requirement of the Ohio statute,[341] it would not be an incorporation by reference and the writing would not have independent legal significance under the Ohio statute[342] since it would have no legal significance apart from its disposition of property under the will. Ohio law seems to limit the doctrine to the inter vivos trust situation.

VI. RULES OF CONSTRUCTION

Part 6 of Article II codifies a number of rules governing the interpretation and construction of wills. The official comment states: "[A]ll of the 'rules' set forth in this part yield to a contrary intent expressed in the will and are therefore merely presumptions."[343] This would be true under present Ohio law also. The Ohio courts have held that in construing a will the sole function of the court is to ascertain and give effect to the intent of the testator, and that intent must be ascertained from the words used in the will, given the usual and ordinary meaning of such words.[344]

It might be noted that the Uniform Code has simplified the language normally used by the statutes. Instead of distinguishing between and listing legacies, bequests, and devises[345] as statutes traditionally do, one term—devise—is used by the Uniform Code to describe all dispositions of property by will, both real and personal.[346] In advancing this policy of simplification a person who is to receive property is a "devisee,"[347] and those who have already received property under a will or by statute are "distributees."[348] It might also be noted that the Uniform Code has no separate rules of construction for trust agreements and other nontestamentary instruments.

Section 2-601 Requirement That Devisee Survive Testator by 120 Hours. A devisee who does not survive the testator by 120 hours is treated as

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341 OHIO REV. CODE ANN. § 2107.05 (Page 1968).

342 *Id.* § 2107.63.

343 UNIFORM PROBATE CODE, Article II, Part 6, General Comment.

344 Cleveland Trust Co. v. Frost, 166 Ohio St. 329, 142 N.E.2d 507 (1957); Findley v. Conneaut, 145 Ohio St. 480, 62 N.E.2d 318 (1945); Townsend v. Townsend, 25 Ohio St. 477 (1874); Collins v. First Nat'l Bank, 20 Ohio App. 2d 1, 251 N.E.2d 610 (1969); Foureman v. Foureman, 79 Ohio App. 351, 70 N.E.2d (1946), *appeal dismissed*, 147 Ohio St. 539, 75 N.E.2d 66 (1947).

345 The term "devise" is properly restricted to real property, and is not applicable to testamentary dispositions of personal property, which are properly called "bequests" or "legacies." But this distinction will not be allowed in law to defeat the purpose of a testator; and all of these terms may be construed interchangeably or applied indifferently to either real or personal property, if the context shows that such was the intention of the testator.
Park Nat'l Bank v. Dillon, 82 Ohio L. Abs. 387, 389, 165 N.E.2d 829, 831 (C.P. 1959).

346 UNIFORM PROBATE CODE § 1-201(7).

347 *Id.* § 1-201(8).

348 *Id.* § 1-201(10).

> if he predeceased the testator, unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster, or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

This section is similar to the Uniform Code provision[349] dealing with survivorship in the case of intestate succession.[350] Both provisions require that the heir or devisee survive the decedent by five days, unless, in the testate case, the will has different survivorship requirements or contains language dealing explicitly with simultaneous or common disaster deaths. As does its intestate counterpart, this provision is intended to prevent multiple probate of the same property when the testator and devisee die within a short time of each other. In some cases, however, the application of the survivorship requirement may not be desirable. If, for example, one spouse has a large separate estate and the other does not, property that is transferred at death from the spouse with the large estate to the other may qualify for the marital deduction which will result in a substantial tax savings. The marital deduction requires, however, that there be a surviving spouse before it is applicable.[351] In those cases in which the tax savings exceeds the cost of double probate, estate planners commonly provide that if the couple die simultaneously the spouse with the large separate estate shall be treated as having predeceased the other, thus making the latter the survivor.[352] The Uniform Code provides for this situation by making the survivorship requirement not applicable when the will makes provision for this situation, and therefore it will not result in a loss of tax savings.

There has been some question as to whether the Uniform Code provision will apply to any devise other than the unadorned gift.[353] If the devise is qualified by an "if living" or "if he survives me" phrase then, it is conceivable that the section would not apply. Clearly, it does not apply when the will requires that the devisee survive the testator.[354] If, for example, the will said "to *A*, if he survives me," would *A* take if he survived the testator by one hour or one day? If so, the application of the section may be quite limited. It would seem that this question could be resolved by deleting this from the section, leaving in tact the section requiring survival for a stated period of time, or the provision allowing for a determination of which spouse is to be treated as having predeceased the other.

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349 *Id.* § 2-104.

350 *See* text accompanying notes 55-58 *supra.*

351 INT. REV. CODE OF 1954, § 2056(a).

352 If the order of deaths cannot be established, a presumption provided in the will that the testator was survived by his spouse, if effective under the state law, will be followed for tax purposes. Treas. Reg. § 20.2056(e)-2(e) (1954). In Ohio the will provision takes precedence over the statute. OHIO REV. CODE ANN. § 2105.21 (Page 1968).

353 Zartman, *supra* note 13, at 427.

354 "[U]nless the will . . . contains some language . . . requiring that the devisee survive . . . ." UNIFORM PROBATE CODE § 2-601.

> Section 2-602 Choice of Law as to Meaning and Effect of Wills.
> The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition.

Traditionally, the law of the decedent's domicile at death governed the disposition of personal property and the law of the situs controlled the disposition of real property.[355] When a court is required to interpret or construe a will to ascertain a meaning of a given provision, reference to the testator's choice of law is one means of determining his intent. Some authors would allow a testator to choose the body of law which he wished to be applicable even in absence of an authorizing statute.[356] The Uniform Code allows "a testator to select the law of a particular state for purposes of interpreting his will without regard to the location of property covered thereby."[357] Thus, a testator domiciled in Ohio could, if he chooses, decide that Massachusetts law is to be used to interpret his will, even though he has no property located in that state. Of course, if he fails to make such a determination the laws of Ohio would be applied to the construction of his will,[358] at least to all his personal property and the real property which is located in Ohio. Under present Ohio law, the law of the situs would be applied in construing language in the will which devised real property located outside of Ohio.[359] This provision of the Uniform Code would not change present Ohio law. The Ohio Supreme Court has stated that wills made by Ohio residents and probated in Ohio are to be administered under Ohio law, unless the will clearly shows a contrary intention on the part of the testator.[360] The court held that one is presumed to know that Ohio law will govern the administration of a will and if one wishes a different result than that provided by the Ohio law, then it should be written in the will.[361] Thus it would seem then that the Ohio testator can presently make the choice provided by the Uniform Code.

There seems to be little reason not to allow the testator to make this choice, since a settlor of a revocable living trust of personalty can achieve his own choice of law by creating the trust in the state whose law he wishes

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355 *See* H. GOODRICH, CONFLICTS OF LAWS §§ 166, 167 (4th ed. 1964); R. LEFLAR, AMERICAN CONFLICTS LAW § 198 (1968); G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 380 (3d ed. 1963).

356 RESTATEMENT (SECOND) OF CONFLICTS §§ 240, 264 (Prop. Off. Draft 1969).

357 UNIFORM PROBATE CODE § 2-602, Comment.

358 Seeley v. Bedillion, 23 Ohio Misc. 4, 51 Ohio Op. 2d 128, 260 N.E.2d 639 (C.P. 1969).

359 Nolan v. Borger, 95 Ohio L. Abs. 225, 203 N.E.2d 274 (P. Ct. 1963). If the decedent is domiciled outside of Ohio the distribution of Ohio personal property shall be according to the law of its deceased owner's domicile, rather than the law of Ohio, unless such application would bring about a result contrary to Ohio public policy. Howard v. Reynolds, 30 Ohio St. 2d 214, 283 N.E.2d 629 (1972).

360 Lozier v. Lozier, 99 Ohio St. 254, 124 N.E. 167 (1919).

361 *Id.* at 257, 124 N.E. at 168.

to be applicable.[362] It follows that he should be permitted to do the same by a provision in his will. The major objections to such a choice have been that it will create uncertainty with respect to titles to real property and also will burden the local courts by requiring them to apply a foreign law.[363] These objections are overcome, however, when we consider that title examiners will generally insist on a court construction when the meaning of a devise of real property is involved. Additionally, courts are already applying foreign law in other circumstances, such as a will devising land "to my heirs-at-law according to the law of" a particular state or devising land outside of the state

> Section 2-603 Rules of Construction and Intention.
>
> The intention 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.

This provision would not change present Ohio law. It has long been established in Ohio that wills are to be construed liberally to give full effect to the testator's intent.[364] One Ohio court has noted that: "The cardinal rule to follow in a will construction case is to ascertain the intention of the testator. This intention is determined from the words used in the will and construction from the four corners. There is no fixed rule applicable to the construction of wills."[365] That court concluded that rules of construction are useful or applicable only insofar as they aid in determining the proper construction with respect to the intention of the testator.

> Section 2-604 Construction That Will Passes All Property; After-Acquired Property.
>
> A will is construed to pass all property which the testator owns at his death including property acquired after the execution of the will.

This provision of the Uniform Code is very similar to the present Ohio statutory provisions.[366] Both the Uniform Code[367] and present Ohio law adopt a presumption against intestacy,[368] allow a will to pass after-acquired property,[369] and provide that for a devise of realty, an absolute title in fee simple passes if nothing appears in the will showing a contrary intent.[370]

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362 *See, e.g.*, National Shawmut Bank v. Cumming, 325 Mass. 457, 91 N.E.2d 337 (1950).

363 O'Connell & Effland, *supra* note 11, at 260.

364 Becker v. Fisher, 112 Ohio St. 284, 147 N.E. 744 (1925); Moon v. Stewart, 87 Ohio St. 349, 101 N.E. 344 (1913); Decker v. Decker, 3 Ohio 157 (1827).

365 Nolan v. Borger, 95 Ohio L. Abs. 225, 229, 203 N.E.2d 274, 276-77 (P. Ct. 1963).

366 OHIO REV. CODE ANN. §§ 2107.50-.51 (Page 1968).

367 O'Connell & Effland, *supra* note 11, at 250.

368 Wright v. Masters, 81 Ohio St. 304, 90 N.E. 797 (1909); Fifth Third Union Trust v. Wilensky, 79 Ohio App. 73, 70 N.E.2d 920 (1946).

369 Pruden v. Pruden, 14 Ohio St. 251 (1862); Fitzgerald v. Bell, 33 Ohio L. Abs. 423, 6 Ohio Supp. 119, *aff'd*, 34 Ohio L. Abs. 631, 39 N.E.2d 186 (Ct. App. 1941).

370 Jones v. Jones, 48 Ohio App. 138, 192 N.E. 811 (1933), *aff'g* 30 Ohio N.P. (n.s.) 81 (C.P. 1932).

Section 2-605 Anti-lapse; Deceased Devisee; Class Gifts.

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree then those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

Both the Uniform Code and the relevant Ohio statute[371] provide that if a devisee within a certain class of specified persons predeceases the testator, the gift passes to the descendent of the predeceased devisee rather than to the residuary devisees. The Uniform Code limits the application of this anti-lapse provision to relatives who are of the degree of kinship of grandparents or relatives descending from grandparents. This is consistent with the Uniform Code policy[372] of eliminating remote relatives from inheriting. The Ohio statute also limits the application of the anti-lapse provision, but not to the same extent as the Uniform Code. In Ohio the provision is limited to relatives of the testator, which would include anyone capable of inheriting under the statute of descent and distribution.[373]

Both the Uniform Code and the Ohio statute save the void gift, *i.e.*, gifts made to a devisee who is dead at the time the will is executed.[374] The Ohio statute does not make specific reference to class gifts,[375] while the Uniform Code expressly states that the anti-lapse provision applies to a class gift. However, the Ohio courts have held that the issue of deceased members of a class take the share the deceased member would have taken had he been alive at the time of the testator's death.[376] If, however, the testator intended[377] that only members of the class should take, the anti-lapse statute would not apply. A deceased member's share would go to the surviving members of the class and not to the heirs of the deceased member.[378]

Under the Uniform Code provision the issue of a predeceased devisee

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371 OHIO REV. CODE ANN. § 2107.52 (Page 1968).

372 UNIFORM PROBATE CODE § 2-103.

373 OHIO REV. CODE ANN. § 2105.06 (Page 1968); *see also* Kovar v. Kortan, 3 Ohio Misc. 63, 32 Ohio Op. 2d 302, 209 N.E.2d 762 (P. Ct. 1965).

374 "When a devise . . . is made to a relative of a testator and such relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, such issue shall take the estate devised as the devisee would have done if he had survived the testator. . . ." OHIO REV. CODE ANN. § 2107.52 (Page 1968).

375 *See* Bensing, *The Ohio Anti-Lapse Statute*, 28 U. CIN. L. REV. 1, 23 (1959).

376 Woolley v. Paxson, 46 Ohio St. 307, 24 N.E. 599 (1899); Thatcher v. Trouslot, 52 Ohio App. 74, 3 N.E.2d 57 (1935).

377 A provision in the will such as "if living at the time of my demise" or "if he survives me" would show the testator's intent that only members of the class should take. *See* Bensing, *supra* note 375, at 28.

378 Nolan v. Borger, 95 Ohio L. Abs. 225, 203 N.E.2d 274 (P. Ct. 1963).

must survive the testator for 120 hours in order to take in the place of the predeceased ancestor. And, if the devisee were to survive the testator but die within the 120 hour period, the provision would apply; it would be treated as if the devisee failed to survive the testator. Again, this would also be true in Ohio because the Ohio survivorship statute[379] dealing with the presumptive order of death is to be read in conjunction with the Ohio anti-lapse statute.[380] The Uniform Code also provides that if the devisee is deceased and his issue are all of the same degree of kinship they are to take equally, but if they are of unequal degrees of kinship, the more remote take by representation. The Ohio anti-lapse provision is silent on this point, but the procedure conforms with Ohio law regarding distribution.[381]

> Section 2-606 Failure of Testamentary Provision.
>
> (a) Except as provided in Section 2-605 if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.
>
> (b) Except as provided in Section 2-605 if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue.

This provision of the Uniform Code would not change present Ohio law.[382] Under both if the lapsed gift is not of the residue and no alternative provision is provided in the will, the lapsed gift passes by the residuary clause.[383] If there is no residuary clause in the will or if for some reason it fails, then the lapsed legacy passes as intestate property both under Ohio law[384] and under the Uniform Code.

Both the Uniform Code and the Ohio statute expressly cover residuary dispositions. In Ohio, if the residuary gift is made to two or more persons who were relatives of the testator and some die before the testator without issue, the gift does not lapse and pass as intestate property to the heirs or next of kin of the testator. Instead, the gift goes to the surviving residuary devisees absent an express disposition in the will. If one of the residuary devisees predeceased the testator leaving issue surviving the testator, however, the statute then applies and the issue take the share by representation.[385] If a residuary devise is left to a devisee who is not a relative, that devise is not covered by the anti-lapse statute, but the issue of the de-

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379 OHIO REV. CODE ANN. § 2105.21 (Page 1968).

380 Muckerheide v. Zink, 1 Ohio App. 2d 76, 202 N.E.2d 725 (1964); Schuck v. Schuck, 80 Ohio L. Abs. 394, 156 N.E.2d 351 (P. Ct. 1958).

381 Schneider v. Dorr, 3 Ohio Misc. 103, 128-29, 32 Ohio Op. 2d 391, 406, 210 N.E.2d 311, 327 (P. Ct. 1965). *See also* Bensing, *supra* note 375, at 18-21.

382 OHIO REV. CODE ANN. § 2107.52 (Page 1968).

383 Commerce Nat'l Bank v. Browning, 158 Ohio St. 54, 107 N.E.2d 120 (1952).

384 Leopold v. Weaver, 9 Ohio App. 379, 29 Ohio C.C.R. (n.s.) 567 (1918).

385 Flynn v. Bredbeck, 147 Ohio St. 49, 68 N.E.2d 75 (1946); *see also* Bensing, *supra* note 375, at 25-28.

visee may still take if the will so provides.[386] If the devisee had no issue the gift would pass to the other residuary devisees, at least if they were relatives of the testator. It is not clear under the Ohio statute whether the residuary devisee can take the lapsed gift if he is not a relative. It would appear that he could not unless the will so provided. This does not seem to be the case under the Uniform Code in which the surviving residuary devisees take the lapsed gift. This would seem to be more consistent with the testator's probable intent, assuming he would prefer the residuary devisees to take the property rather than have it pass by intestacy. The orthodox view has been that the property passes by intestacy rather than to the surviving devisees.[387] The Uniform Code[388] reflects the more modern view and presumes that the testator would prefer the surviving residuary devisees to take instead of having the property pass by intestacy. This would broaden the scope of Ohio law to include nonrelatives.

> Section 2-607 Change in Securities; Accessions; Nonademption.
>
> (a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:
>
> (1) as much of the devised securities as is a part of the estate at time of the testator's death;
>
> (2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;
>
> (3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and
>
> (4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.
>
> (b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

If a testator devises specific property in his will and that property is not owned by him at the time of his death, the general rule is that the gift is adeemed by extinction.[389] Most courts have held in this case that the testator's intention is not to be considered, the only issue being whether the property is part of the estate.[390] If it is not, the bequest is adeemed and the devisee receives nothing. Some courts, however, have refused to apply the doctrine, if its application would defeat a gift in situations in which the

386 Evans v. Cass, 23 Ohio Misc. 300, 51 Ohio Op. 2d 417, 256 N.E.2d 738 (P. Ct. 1970).

387 T. Atkinson, *supra* note 70, § 140 at 748; 4 W. BOWE & D. PARKER, *supra* note 264, § 33.56.

388 UNIFORM PROBATE CODE § 2-606(b).

389 *See* T. Atkinson, *supra* note 79, at 134.

390 *See, e.g.*, Lang v. Vaughn, 137 Ga. 671, 74 S.E. 270 (1912); Elwyn v. DeGarmendia, 148 Md. 109, 128 A. 913 (1925); Moffatt v. Heon, 242 Mass. 201, 136 N.E. 123 (1922); Welch v. Welch, 147 Miss. 728, 113 So. 197 (1927).

testators probably intended that the gift should be valid.[391] The Uniform Code takes this same approach and specifies the property which the devisee will receive.[392] Ohio's statutory provision, at least to the extent that the testator alters his interest in his property, is also in accord with this approach.[393]

Modern developments in securities' distribution, such as stock splits, dividends and changes in corporate structure (such as the development of the conglomerate and mergers) have created serious problems in those situations in which a testator makes a specific bequest of stocks or bonds in his will and there has been a change in the composition of his holdings by the time of his death. Most courts, including Ohio's, hold that if the change is only one of form and not of substance, there is no ademption,[394] such as when one corporation in which a testator owns stock is merged into another and given a new name.[395] The Uniform Code provides that the devisee, in these situations, receives not only the devised securities which are a part of the testator's estate, but also additional securities[396] of the same or another entity which are owned by the testator pursuant to some action initiated by the entity, such as a merger, consolidation or reorganization. Also, additional securities in a regulated investment company, which have been purchased by the testator as a result of a reinvestment plan, go to the

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391 *See, e.g., In re* Elliott's Estate, 174 Kan. 252, 255 P.2d 645 (1953); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959).

392 UNIFORM PROBATE CODE §§ 2-607, 608.

393 An act of a testator which alters but does not wholly divest such testator's interest in property previously devised or bequeathed by him does not revoke the devise or bequest of such property, but such devise or bequest shall pass to the devisee or legatee the actual interest of the testator, which would otherwise descend to his heirs or pass to his next of kin; unless, in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.

If the instrument by which such alteration is made is wholly inconsistent with the previous devise or bequest, such instrument will operate as a revocation thereof, unless such instrument depends on a condition or contingency, and such condition is not performed or such contingency does not happen.

OHIO REV. CODE ANN. § 2107.36 (Page 1968).

394 *See, e.g., In re* Frahm's Estate, 120 Iowa 85, 94 N.W. 444 (1903); Goode v. Reynolds, 208 Ky. 441, 271 S.W. 600 (1925); Gorham v. Chadwick, 135 Me. 479, 200 A. 500 (1938); Bool v. Bool, 165 Ohio St. 262, 135 N.E.2d 372 (1956); Clegg v. Lippold, 68 Ohio L. Abs. 590, 123 N.E.2d 549 (P. Ct. 1951). *See also* Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953).

395 Warren v. Shoemaker, 4 Ohio Misc. 15, 33 Ohio Op. 2d 20, 207 N.E.2d 419 (P. Ct. 1965).

396 Securities include

any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

UNIFORM PROBATE CODE § 1-201(37).

specific devisee of the stock. No other distributions with respect to a specifically devised security prior to the testator's death are included in the specific devise. Thus, cash dividends declared and payable as of a record date prior to the testator's death do not pass as a part of the specific devise, even if they were paid after his death.[397] This would also be the case in Ohio. The Ohio courts have held not only that cash dividends do not pass to the specific devisee, but also that stock dividends will not pass with the specific devise, but rather become a part of the residue.[398] This is so even though the stock dividends were received by the testator prior to his death. The Uniform Code would change this so that the stock dividends would go to the specific devisee of the stock. Of course, stock or cash dividends received by the executor during the administration of the estate would go into the residue under either the Code or present Ohio law.[399]

If, for example, the testator in his will devised "my 100 shares of the *ABC* Corporation common stock to *A*," and the corporation had declared a stock dividend in its own nonvoting preferred stock, and the testator owns these additional shares of preferred stock at his death, they will pass to the specific devisee with the shares of common stock owned by the testator at his death. If the corporation had issued stock options and the testator had exercised these options to purchase additional shares of common stock, however, these shares would not pass to the devisee since they were not acquired as the result of an action initiated by the corporation.

> Section 2-608 Nonademption of Specific Devises in Certain Cases; Sale by Conservator; Unpaid Proceeds of Sale, Condemnation or Insurance.
>
> (a) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply 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 year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).
>
> (b) A specific devisee has the right to the remaining specifically devised property and:
>
> (1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

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397 *Id.* § 2-607, Comment.

398 Warren v. Shoemaker, 4 Ohio Misc. 15, 33 Ohio Op. 2d 20, 207 N.E.2d 419 (P. Ct. 1965).

399 Third Nat'l Bank & Trust Co. v. Gardner, 24 Ohio Misc. 223, 53 Ohio Op. 2d 261, 262 N.E.2d 430 (C.P. 1970); Day v. Brooks, 10 Ohio Misc. 273, 39 Ohio Op. 2d 441, 224 N.E.2d 557 (P. Ct. 1967); Warren v. Shoemaker, 4 Ohio Misc. 15, 33 Ohio Op. 2d 20, 207 N.E. 2d 419 (P. Ct. 1965).

> (2) any amount of a condemnation award for the taking of the property unpaid at death;
> (3) any proceeds unpaid at death on fire or casualty insurance on the property; and
> (4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

The Uniform Code provides for nonademption in situations in which the devised asset is eliminated from the testator's estate at a time when he is unable to change his will. This result reflects the probable intent of the testator. The devise should not adeem since presumably the testator would still wish to benefit the devisee in his will. If, for example, the testator's property is being managed by a conservator, the Uniform Code provides that the conversion of the asset into money in certain specified cases gives the specific devisee the right to a general pecuniary devise equal to the net amount received for the property. This position is in accord with the result which a majority of courts have reached on the same issue.[400] While the Uniform Code converts the specific devise into a general pecuniary devise for distribution purposes, under Ohio case law it would remain a specific devise.[401]

The Uniform Code[402] does not distinguish reasons for a testator's being under a conservatorship.[403] It may be that he is mentally incompetent or merely physically incapacitated. In either case, the effect seems to be the same: if the asset is converted during the conservatorship, the gift is not adeemed. Ohio courts, in determining whether there has been an ademption of the devise in the situations specified in subsection (a), have made a distinction between conservatorships that result from mental incompetence and those that are the result of physical incapacity. If the conservator is appointed for a testator who is physically disabled but whose testamentary capacity remains unimpaired, then the conversion of the property would be an ademption of the devise because the testator has the capacity to make

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[400] *See, e.g.*, Our Lady of Lourdes v. Vanator, 91 Idaho 407, 422 P.2d 74 (1967); Lewis v. Hill, 387 Ill. 542, 56 N.E.2d 619 (1944); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959).

[401] Roderick v. Fisher, 97 Ohio App. 95, 99, 122 N.E.2d 475, 478 (1954).

[402] UNIFORM PROBATE CODE § 2-608(a).

[403] Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, . . . and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

Id. § 5-401(2). The official comment states that the term "disabled persons" is used in this section to include a broad category of persons who, for a variety of reasons, may be unable to manage their own property. *Id.* § 5-401, Comment.

a testamentary disposition of his property.[404] But, if the testator is mentally incompetent and lacks the testamentary capacity to make a new will at the time of the conversion and thereafter until his death, then the devise would not be adeemed.[405] Since the Uniform Code provision does not make such a distinction, it would change present Ohio law. There would be no ademption in either situation if the testator had been adjudicated incompetent—for whatever reason.

The Uniform Code[406] also provides for nonademption in situations in which the specifically devised property has been removed from the testator's estate at or shortly before his death. In each of these situations[407] there has been such a material alteration in the subject matter of the devise that a majority of jurisdictions, including Ohio,[408] would cause the devise to be adeemed if the testator were not under a conservatorship. If the removal was involuntary[409] it is reasonable to assume that the testator did not intend an ademption of the specific devise. If the testator had a reasonable period of time to amend his will after the property had been removed from his estate, however, this assumption would no longer be valid. His failure to act would indicate that he intended the devise to fail. If the removal of the property from the estate had been done voluntarily[410] by the testator, it seems clear that he would not intend for the specific devisee to receive the property. The Uniform Code provides, in both the voluntary and involuntary situations, that the portion of the purchase price paid to the testator during his lifetime is adeemed. Yet, any balance owed at his death, together with any security interest in the property, is not adeemed and goes to the specific devisee. The testator's probable intent in these situations would suggest that a voluntary removal of the asset should be an ademption and that an involuntary removal should not, provided, of course, that the testator did not have a reasonable period of time to change his will after the involuntary removal.[411]

> Section 2-609 Non-Exoneration.
>
> A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

This provision would change existing Ohio law.[412] Ohio presently

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404 Roderick v. Fisher, 97 Ohio App. 95, 122 N.E.2d 475 (1954).

405 Bishop v. Fullmer, 112 Ohio App. 140, 175 N.E.2d 209 (1960).

406 UNIFORM PROBATE CODE § 2-608(b).

407 *Id.* §§ 2-608(b)(1)-(4).

408 Lewis v. Thompson, 142 Ohio St. 338, 52 N.E.2d 331 (1943).

409 UNIFORM PROBATE CODE §§ 2-608(b)(2), (3).

410 *Id.* §§ 2-608(b)(1), (4).

411 For a criticism of § 2-608 see Zartman, *supra* note 13, at 430.

412 OHIO REV. CODE ANN. § 2107.54 (Page 1968) provides in part:

> A devisee or legatee shall not be prejudiced by the fact that the holder of a claim secured by lien on the property devised or bequeathed failed to present such claim to the

follows the common law rule of exoneration: if real or personal property which secures a personal debt of the testator is specifically devised and the will does not indicate a contrary intent, the personal representative has a duty to pay the debt out of intestate or residuary property first and the specific devisee is entitled to the specific devise free of the lien.[413] The Uniform Code abolishes this common law presumption regarding the testator's intent; there is no right to exoneration unless the will provides otherwise.

Depending upon the particular circumstances, the Uniform Code approach may or may not carry out the probable intent of the testator. Liens on property at the time a will was executed would seem to indicate that the testator was contemplating the property as it then existed, subject to the lien, and the presumption should be against exoneration. If, however, at the time the testator executed the will, the property devised is owned free of any liens but is later encumbered, it is much more likely that the testator intended the specific devisee to take the property free of the lien. This would be true particularly if the testator had mortgaged or pledged the property to secure a loan, the proceeds of which increase the residuary estate. The Uniform Code should be modified to reflect the testator's probable differing intents in each of these two situations.[414]

> Section 2-610 Exercise of Power of Appointment.
>
> A general residuary clause in a will, or a will making general disposition of all of the testator's property, does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

Several states have recently adopted special legislation relating to powers of appointment. Since there is some indication that this will be followed by more states, the Uniform Code has generally avoided any provisions relating to these powers.[415] There is need, however, for uniformity of result. Does a will purporting to dispose of all of a testator's property exercise a power of appointment of which he is the donee? Or does the use of a standard residuary clause manifest an intent to exercise such a power?[416]

The Ohio law on this issue is somewhat confused at present. It has been the rule that a power of appointment is not exercised by a general re-

executor or administrator for allowance within the time allowed by . . . the Revised Code, and the devisee or legatee shall be restored by right of contribution, exoneration, or subrogation, to the position he would have occupied if such claim had been presented and allowed for such sum as is justly owing thereon.

413 Holmes v. Hrobon, 93 Ohio App. 1, 103 N.E.2d 845 (1951). *See also* T. Atkinson, *supra* note 70, § 137; 6 W. BOWE & D. PARKER, *supra* note 264, § 52.16.

414 O'Connell & Effland, *supra* note 11, at 255-56.

415 UNIFORM PROBATE CODE § 2-610, Comment.

416 *See* 1 AMERICAN LAW OF PROPERTY, *supra* note 139, § 23.40; 5 W. BOWE & D. PARKER, *supra* note 264, § 45.21; L. SIMES & A. SMITH, LAW OF FUTURE INTEREST § 973 (1956).

siduary clause or by a will which makes a general disposition of all of the testator's property.[417] One Ohio court has recently held, though, that a testamentary power of appointment is an "estate, right or interest in property"[418] under the statutory provision that passes all of a decedent's property under his will, and, therefore, a testamentary power of appointment is exercised by the general residuary clause in the testator's will unless the will manifests a different intention.[419] The court held that since the will did not manifest a different intent, the statute applied to the power of appointment as an "estate, right or interest in property."

The trial court, in considering the application of the statute to powers, rejected the contention on the basis that the caption to the provision and the history of the statute indicated that its purpose was to provide for the passage of property acquired after the execution of a will.[420] It further stated that since the section made no reference to powers and since there is a requirement for strict construction of statutes which are in derogation of the common law, the section was not intended to change Ohio law with respect to the exercise of a general power of appointment in a general residuary clause.

The court of appeals, in reversing this decision, held that the statutory provision is applicable to all of a testator's property and is not limited to property acquired subsequent to the execution of a will.[421] The court noted that reference to the title of a statute to determine its meaning is appropriate if the intended subject matter is in doubt. But the court said that since the statute in question was clear and concise, to interpret the title to limit its application to property acquired subsequent to the execution of a will constituted judicial legislation.[422] It would appear that the court gave considerable weight to the fact that the testator was a deaf-mute and that his concept of property was broader than that of a normal person because of his limited ability to communicate, which would handicap him in discerning and differentiating between the power to appoint property and

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417 Ohio courts have held that neither the residuary clause nor a general recital of property passing under the will may exercise a power of appointment, unless "[a]n intention to execute a testamentary power of disposition may be shown by (a) referring to the power in the will; (b) by making a specific disposition of the subject matter of the power; or (c) by showing that the will not have any operation except as an execution of the power." Herron v. Jones, 55 Ohio App. 274, 277, 9 N.E.2d 703, 704 (1936), *citing* Kiplinger v. Armstrong, 34 Ohio App. 348, 352, 171 N.E. 245, 246 (1930).

418 "Any estate, right, or interest in any property of which a decedent was possessed at his decease shall pass under his will unless such will manifest a different intention." OHIO REV. CODE ANN. § 2107.50 (Page 1968).

419 Dollar Savings & Trust Co. v. Kirkham, Case No. 4993, Ohio App. 7th D., June 12, 1972, *rev'g* 21 Ohio Misc. 163, 255 N.E.2d 892 (C.P. 1969). *See also* Dollar Savings & Trust Co. v. First Nat'l Bank, —— Ohio Misc. ——, 285 N.E.2d 768, 773 (C.P. 1972).

420 Dollar Savings & Trust Co. v. Kirkham, 21 Ohio Misc. 163, 167, 255 N.E.2d 892, 895 (C.P. 1969).

421 Dollar Savings & Trust Co. v. Kirkham, Case No. 4993, Ohio App. 7th D., June 12, 1972.

422 *Id.* at 4.

property he owned. The fact that the testator was not on good terms with his heirs at law also influenced the court's finding that the intent of the testator was to exercise the power.

The official comment to the Uniform Code states that there are two reasons for it taking the position that a general residuary clause is not sufficient to exercise a power of appointment: "(1) this is still the majority rule in the United States; and (2) most powers of appointment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise."[423] The comment further states that an intent to exercise such power may be effective if it is "indicated by the will." This wording will permit a court to find the manifest intent if the language of the will, interpreted in light of all the surrounding circumstances, shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express reference to the original creating instrument.[424] Thus the Uniform Code makes available the modern rule of interpretation of a donee's will, which was adopted in Ohio by the *Kirkham* case. That court looked to the surrounding circumstances and determined that the donee intended the power to be exercised even though the will lacked such express language.

> Section 2-611 Construction of Generic Terms to Accord with Relationships as Defined for Intestate Succession.
>
> Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.

When a will contains class gift terminology, questions of construction often arise concerning the inclusion within the class of persons with a particular status. These questions have generated a large volume of litigation in Ohio as well as in other states, and courts are divided on who should be included within the class.

Until recently in Ohio, the presumption had been that the adopted child was not included in a class of beneficiaries if the testator had been a "stranger to the adoption"[425] and had not indicated an intent to include the adopted child by the language used in his will.[426] Under this view an

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[423] UNIFORM PROBATE CODE § 2-610, Comment.

[424] *Id.*

[425] The "stranger to the adoption rule" presumes that an adopted child is deemed excluded from a class of beneficiaries if the testator was not a party to the adoption proceedings and has not otherwise manifested an intent to include his adopted children. National City Bank v. Mitchell, 13 Ohio App. 2d 141, 234 N.E.2d 916 (1968).

[426] Third Nat'l Bank & Trust Co. v. Davidson, 157 Ohio St. 355, 105 N.E.2d 573 (1952); Albright v. Albright, 116 Ohio St. 668, 157 N.E. 760 (1927).

adopted child was included in a class described by the terms "issue" or "child" if the term was used by the adopting parent, but such child was excluded if the term was used by anyone else, particularly if the adoption took place after the execution of the will or the death of the testator.[427] Recently, however, one Ohio court[428] held that the legislature has abrogated the "stranger to the adoption" rule by statute.[429] In this case one of the adoptions occurred subsequent to the execution of the will of the testator and the other subsequent to a codicil. Both adoptions were prior to the death of the testator, who had been a "stranger" to the adoption. The court affirmed the trial court's holding that the adopted children were included in the class of grandchildren. By way of dictum the court stated that children adopted by any of the testator's children after the testator's death would also be considered members of the class of grandchildren.[430] The court reasoned that the Ohio statutory provision conferred upon the legally adopted child the same rights, status and legal relationship to the adopting parents as though he had been born to them, and that limitations in wills executed after the effective date of the statute[431] in favor of "grandchildren" of the testator would also apply to his adopted grand-

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427 National City Bank v. Judkins, 8 Ohio Misc. 119, 37 Ohio Op. 2d 200, 219 N.E.2d 456 (C.P. 1964).

The court in the *Judkins* case listed factors that are to be considered in determining whether or not the adopted child is to be included in a class gift. The court stated that:

> The determination of the right of an adopted child to succeed to interests in property which by the terms of a will, living trust or other instrument are limited to a "child," "children," "issue," "grandchildren," "heirs," "legal heirs," or "heirs of the body," etc. of the person or class of persons named in such instrument depends upon many diverse factors. These include (1) the content and phraseology of the instrument, (2) the provision of the adoption statutes in effect at the time of the adoption as an aid to the construction of the instrument, (3) the time when the instrument was executed in relation to the time of the adoption, and (4) whether the settlor or testator was himself the adopting parent or whether the issue involved an adopted child or persons other than the testator or settlor.

Id. at 129, 37 Ohio Op. 2d at 205-06, 219 N.E.2d at 463.

428 Conkle v. Conkle, 31 Ohio App. 2d 44, 285 N.E.2d 883 (1972); Weitzel v. Weitzel, 16 Ohio Misc. 105, 45 Ohio Op. 2d 55, 239 N.E.2d 263 (P. Ct. 1968). The *Weitzel* court held that:

> The stranger-to-the adoption presumption is unfair, inequitable, and has no relationship to the actual attitude and experience of the general public, the courts and students of adoption, and therefore should be avoided either by judicial action or by legislative fiat. In the alternative the . . . rule should be restricted to adoptions occurring after the death of the testator and of which that testator had no knowledge or reason to believe that they would occur. The construction used by the North Carolina Courts should be adopted as the rule in Ohio if the stranger to the adoption rule is not voided entirely: The adopted child will be included in a class gift to strangers if (1) the testator knew of the adoption, (2) the testator approved of the adoption, (3) the adoption occurred prior to the death of the testator and after the execution of the will or instrument, (4) the testator had the physical and mental ability to change the will to eliminate the adopted children. And alternately to all the above, any other circumstances which are present tending to show that the testator intended to include adopted children within the class.

Weitzel v. Weitzel, 16 Ohio Misc. at 115, 45 Ohio Op. 2d at 61, 239 N.E.2d at 270.

429 OHIO REV. CODE ANN. § 3107.13 (Page 1972).

430 Conkle v. Conkle, 31 Ohio App. 2d 44, 52, 285 N.E.2d 883, 886-87 (1972).

431 Effective Oct. 26, 1961.

children. This would be true whether they were adopted prior or subsequent to either the execution of the testator's will or his death, in the absence of any language in the will showing a contrary intent. It would seem that on the basis of the *Conkle* case, Ohio law now conforms with the Uniform Code, at least as to the inclusion of adopted persons in the class gift terminology and terms of relationship.

Under Ohio's statute of descent and distribution,[432] half-bloods share in the same manner as whole bloods. An Ohio court in the construction of a will in which the remainder was given to the "legal heirs" of the life tenant held that a half sister of the life tenant who died without issue took rather than the heirs of the testator.[433] In a case in which the testatrix devised property to her brothers and sisters, a court held that a half sister and a stepbrother should be included in the class because the testatrix had only one full sister and no brothers, but had always referred to the half sister and stepbrother as "sister" and "brother," respectively.[434] The court stated that the meaning of the terms "brother" and "sister" in a will depends upon the intention of the testator.[435] On the basis of these cases and the Ohio statute[436] it would appear that half-bloods should be included in class gift terminology in Ohio.

Ohio law also provides that, "[B]astards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit or to whom she may transmit inheritance, as if born in lawful wedlock."[437] This statute permits the illegitimate child, so far as the mother and her relatives are concerned, to enjoy the same rights of inheritance as does a legitimate child.[438] While there are no Ohio cases directly in point, it appears that the illegitimate child would share in class gifts made to "heirs," "issue," "children," or any other term describing the relationship of the mother to the illegitimate child. In Ohio the common law rule governs the relationship of the illegitimate child with the natural father, unless the child is legitimized by one of the two means provided for by statute.[439] There is no common law right to inherit from or through the natural father. Therefore, the illegitimate child in Ohio would not be included in a class gift made to the children of the natural father.[440] The Uniform Code provision would modify present Ohio law with respect to

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432 OHIO REV. CODE ANN. § 2105.06(F) (Page 1968).

433 Reif v. Ulmer, 9 Ohio N.P. (n.s). 234, 20 Ohio Dec. 342, *aff'd*, 85 Ohio St. 496, 98 N.E. 1131 (1912).

434 Griffitt v. Wetzel, 17 Ohio N.P. (n.s.) 49, 25 Ohio Dec. 257 (C.P. 1915).

435 *Id.*

436 OHIO REV. CODE ANN. § 2105.06(F) (Page 1968).

437 *Id.* § 2105.17.

438 Kest v. Lewis, 169 Ohio St. 317, 159 N.E.2d 449 (1959).

439 OHIO REV. CODE ANN. § 2105.18 (Page 1968). The methods allowed are marriage to the mother with an acknowledgment of the child as his own by application to the probate court.

440 Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948).

situations in which a natural father openly and notoriously treats a child as his own. Under Ohio law this kind of acknowledgment, absent either the father's marriage to the mother or an order from the probate court, does not enable the child to inherit from or through the father, and thus the child would not be included as a relative of the father for purposes of a class gift.[441]

> Section 2-612 Ademption by Satisfaction.
>
> Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part, only if the will provides for deduction of the lifetime gift, or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

The doctrine of satisfaction is the testate counterpart to (and reflects the same policy considerations as) the doctrine of advancements in the intestate area. This provision of the Uniform Code parallels the provision for advancements.[442] It requires written evidence of an intent that lifetime gifts made by the testator are to be taken into account during the distribution of the estate.[443] Ohio law would be changed in this area with the adoption of the Uniform Code. Ohio presently follows the common law rule: if a gift is made subsequent to the execution of the will to a child of the testator or one with whom the testator stands *in loco parentis*, and the gift is of the same type or for the same purpose as the gift in the will, there is a presumption that the testator intended the gift under the will to be adeemed *pro tanto*, absent any expressed intention to the contrary evidenced by the will or by extrinsic circumstances.[444] This presumption only arises if the devisee is a child of the testator or one with whom the testator stands *in loco parentis*. If the gift is to some other person, the presumption does not arise and it must be shown, either from the will or by extrinsic evidence, that the testator intended the gift to adeem.[445]

The Uniform Code does away with this presumption of satisfaction and requires either a contemporaneous writing from the testator stating that the gift is to be deducted, a writing from the devisee stating the gift is in satisfaction, or a provision in the will providing for the deduction of gifts made during the testator's life.[446] The satisfaction provi-

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441 Aetna Life Insurance Co. v. McMillan, 171 F. Supp. 111 (N.D. Ohio 1958).

442 UNIFORM PROBATE CODE § 2-110.

443 *Id.* § 2-612, Comment.

444 Ellard v. Ferris, 91 Ohio St. 339, 110 N.E. 476 (1915).

445 *Id.*

446 UNIFORM PROBATE CODE § 2-612.

sion applies equally to children of the testator, persons with whom the testator stands *in loco parentis*, and strangers, as does the provision for advancements.[447]

VII. CONTRACTUAL ARRANGEMENTS RELATING TO DEATH

Section 2-701 Contracts Concerning Succession.

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after the effective date of this Act, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The Ohio Statute of Frauds provides that any agreement to make a will or to make a devise to any person by a will is unenforceable unless it is in writing.[448] Such agreement must be signed by either the maker or someone else at his express direction. If the instrument is signed by someone other than the maker, the instrument must be witnessed and subscribed by at least two witnesses who heard the maker acknowledge that he authorized the signing. The Uniform Code contains a similar requirement, providing that the will must set out the material provisions of the contract, make specific reference to the contract by extrinsic evidence to prove its terms, or require a separate writing signed by the maker evidencing such contract.[449]

It does not appear that the adoption of the Uniform Code would change existing Ohio law. The Ohio courts have refused to apply the doctrine of part performance to an oral contract to make a will under any circumstances.[450] Thus not only part performance, but also full performance of an oral contract to make a will does not remove the contract from the operation of the Ohio statute.[451] Courts have traditionally allowed the use of equitable doctrines, however, to avoid the harsh impact of the Statute of Frauds.[452] In Ohio several remedies are available to an injured party. One of the most common has been an action at law for damages.[453] In addition, Ohio courts have also held that equitable relief in the nature

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447 *See* text accompanying notes 94-101 *supra.*

448 OHIO REV. CODE ANN. § 2107.04 (Page 1968).

449 UNIFORM PROBATE CODE § 2-701.

450 Sherman v. Johnson, 159 Ohio St. 209, 112 N.E.2d 326 (1953); Snyder v. Warde, 151 Ohio St. 426, 86 N.E.2d 489 (1949).

451 Frantz v. Maher, 106 Ohio App. 465, 155 N.E.2d 471 (1957).

452 *See generally* Schnebly, *Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds*, 24 MICH. L. REV. 749 (1926).

453 Newbold v. Michael, 110 Ohio St. 588, 144 N.E. 715 (1924); Kling v. Bordner, 65 Ohio St. 86, 61 N.E. 148 (1901); Crabill v. Marsh, 38 Ohio St. 331 (1882); Howard v. Bower, 37 Ohio St. 402 (1881).

of specific performance[454] may be granted against those to whom the property has passed. This injunctive relief requires them to convey the property in accordance with the terms of the contract.[455] If the oral contract to devise property was made in return for services performed, then an action on the *quantum meruit* theory is alternatively available.[456]

There have been arguments made both for[457] and against[458] statutory prohibition of oral contracts to leave property by will. Based on a protective-judicial balance, it seems preferable to require a writing. This is consistent with Ohio policy and eliminates many potentially unintended and undesirable consequences for persons entering such contracts.[459] The Uniform Code also provides that the execution of joint and mutual wills does not raise the presumption of a contract prohibiting revocation, which is the law in Ohio as well.[460] However, the Uniform Code would have a broader reach than has the Ohio statute. Ohio courts have held that the statute[461] has no application to an oral agreement to die intestate,[462] while the Uniform Code applies to contracts (1) to make a will; (2) prohibiting revocation of a will; and (3) to die intestate.[463]

VIII. GENERAL PROVISIONS

Section 2-801 Renunciation of Succession.

(a) A person (or his personal representative)who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time and the place hereinafter provided. The instrument shall (i) describe the property or part thereof or interest therein renounced, (ii) be signed by the person renouncing and (iii) declare the renunciation and the extent thereof.

(b) The writing specified in (a) must be filed within [6] months after the death of the decedent or the donee of the power, or if the taker

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454 This relief, although commonly referred to as "specific performance," technically is not. There can be no breach of the contract during the promisor's life, since he can make the agreed will at any time, and after his death it is of course no longer possible for him to do so and thus specific performance is impossible. *See* 55 O. JUR. 2d *Wills* § 19 (1963).

455 Emery v. Darling, 50 Ohio St. 160, 33 N.E. 715 (1893); *In re* Barnes, 64 Ohio L. Abs. 6, 108 N.E.2d 88 (C.P. 1950), *aff'd*, 64 Ohio L. Abs. 28, 108 N.E.2d 101 (1952).

456 Sherman v. Johnson, 159 Ohio St. 209, 112 N.E.2d 326 (1953); Howard v. Brower, 37 Ohio St. 402 (1881); Struble v. Struble, 42 Ohio App. 353, 182 N.E. 48 (1932). *See generally*, 55 O. JUR. 2d *Wills* § 20 (1963).

457 O'Connell & Effland, *supra* note 11, at 261.

458 *See* Note, *Contracts: Statute of Frauds: Quasi-Specific Performance of Oral Contracts to Will*, 7 U.C.L.A.L. REV. 132 (1960).

459 See O'Connell & Effland, *supra* note 11, at 261.

460 McGlone v. Gompert, 112 F. Supp. 840 (N.D. Ohio 1953).

461 OHIO REV. CODE ANN. § 2107.04 (Page 1968).

462 Frantz v. Maher, 106 Ohio App. 465, 155 N.E.2d 471 (1957).

463 UNIFORM PROBATE CODE § 2-701.

of the property is not then finally ascertained not later than [6] months after the event by which the taker or the interest is finally ascertained. The writing must be filed in the Court of the county where proceedings concerning the decedent's estate are pending, or where they would be pending if commenced. A copy of the writing also shall be mailed to the personal representative of the decedent.

(c) Unless the decedent or donee of the power have otherwise indicated by will, the interest renounced, and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced, passes as if the person renouncing had predeceased the decedent, or if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(d) Any (1) assignment, conveyance, encumbrance, pledge or transfer of property therein or any contract therefor, (2) written waiver of the right to renounce or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary or person designated to take pursuant to a power of appointment exercised by testamentary instrument, or (3) sale or other disposition of property pursuant to judicial process, made before the expiration of the period in which he is permitted to renounce, bars the right to renounce as to the property.

(e) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(f) This section does not abridge the right of any person to assign, convey, release, or renounce any property arising under any other section of this Code or other statute.

(g) Any interest in property which exists on the effective date of this section, but which has not then become indefeasibly fixed both in quality and quantity, or the taker of which has not then become finally ascertained, may be renounced after the effective date of this section as provided herein. An interest which has arisen prior to the effective date of this section in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.

The Ohio statutory counterpart allows any competent adult to renounce any interest in property he may receive by way of intestate succession[464] or by will.[465] Renounced property shall pass as if the renouncer had predeceased the decedent in the case of intestacy, or shall go into the residue, if there be one, and if not then it passes as intestate property in the case of a will. Under the Uniform Code if the devisee who renounces "is a relative who leaves issue surviving the testator, the issue will take under Section 2-605; otherwise disposition will be governed by Section 2-606 and

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[464] OHIO REV. CODE ANN. § 2105.061 (Page 1968).

[465] *Id.* § 2113.60.

general rules of law."[466] The reason for this pattern of distribution is that it is consistent with the provision on how property passes in the case of intestacy.[467] This would modify Ohio law since the applicable Ohio statute[468] does not provide for the issue of the devisee to take, but rather that the property shall pass by the residuary clause if there is one or, if not, as intestate property of the testator.

Both the Uniform Code and the Ohio statutory provisions allow the devisee or heir to renounce in whole or in part his inheritance, in which case the interest passes as if he had predeceased the decedent. The reason for such provisions is the common law policy that an heir cannot renounce because title vests in an heir by operation of law rather than by gift, the latter being the case for a will.[469] Thus the heir cannot refuse the legacy, but a beneficiary under a will can. In terms of policy this distinction is difficult to justify,[470] and several states, including Ohio, have enacted legislation to correct this inequity.[471] Renunciation has its primary significance as a postmortem estate planning device,[472] but it may also be used by the heir or beneficiary to avoid his own creditors who would levy on his share of the estate.[473] The Uniform Code provides that renunciation must be in writing, signed by the renouncer, made within six months[474] of the death of the decedent, and must describe the property renounced. It also specifies certain events which will bar one's right to renounce.[475] However, the presence of a spendthrift clause in the instrument does not prevent renunciation.

> Section 2-802 Effect of Divorce, Annulment, and Decree of Separation.
>
> (a) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

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466 UNIFORM PROBATE CODE § 2-801, Comment.

467 *Id.*

468 OHIO REV. CODE ANN. § 2113.60 (Page 1968).

469 *In re* Estate of Krakoff, 87 Ohio L. Abs. 387, 179 N.E.2d 566 (P. Ct. 1961); *see also* T. Atkinson, *supra* note 70, § 139.

470 *See* Howe, *Renunciation by the Heir, Devisee, or Legatee*, 42 KY. L. REV. 605 (1953).

471 COLO. REV. STAT. ch. 153-43; ILL. REV. STAT. ch. 3, § 15(b)-(d) (Supp. 1965); N.Y. CONSOL. LAWS, E.P.T.L. § 41-1.3 (McKinney 1967); N.C. GEN. STAT. § 29-10; WIS. STAT. ANN. § 237.01(8).

472 *See* Note, *Disclaimers as a Postmortem Estate Planning Device*, 37 U. CIN. L. REV. 567 (1968); Platt, *Tax Reform 1969: The Estate Tax Charitable Deduction and the Private Charitable Foundation*, 31 OHIO ST. L.J. 203 (1970).

473 *See* Annot., 133 A.L.R. 1428 (1941), 27 A.L.R. 472 (1923) for cases denying relief to creditors of persons renouncing. *Contra, In re* Estate of Kalt, 16 Cal. 2d 807, 108 P.2d 401 (1940); Coomes v. Finegan, 223 Iowa 448, 7 N.W.2d 728 (1943), *noted* at 28 IOWA L. REV. 700 (1943), 41 MICH. L. REV. 1201 (1943), 92 U. PA. L. REV. 105 (1943-44).

474 The time period is optional. Each state may set a time limitation within which the renunciation must be submitted to the court.

475 UNIFORM PROBATE CODE § 2-801(d).

> (b) For purposes of Part 1, 2, 3, and 4 of this Article, a surviving spouse does not include:
> (1) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;
> (2) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or
> (3) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

The general tenor and philosophy of the Uniform Code is to protect the surviving spouse. For example, the surviving spouse is an heir under the intestate succession provision and has a right to an elective share if she does not care for the provision made for her in the will. Further, if the testator unintentionally omits her from a will executed prior to marriage, she has a right to the intestate share; and she also has a right to the homestead, exempt property and family allowances.[476]

Under the Uniform Code a divorce or annulment terminates a surviving spouse's status and the protection that status affords, unless there is a subsequent marriage of the parties and the spouse is married to the decedent at the time of the latter's death. A legal separation which does not terminate the status of husband and wife does not affect the status of the surviving spouse, and succession patterns are unchanged. However, if there is a complete property settlement accompanying the separation decree, then this may be a renunciation of benefits under § 2-204.[477] The official comment states that: "[A]lthough some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally, this is divorce."[478]

In Ohio, the adultery of either spouse coupled with desertion will bar that spouse from a dower interest in the property of the other, unless the offense is later condoned by the injured party,[479] thus divorce is unnecessary to bring about the barring of dower.[480] Ohio courts interpreting the statute[481] have held that a husband living separate and apart from his wife is not entitled as a surviving spouse to remain in the mansion house for one year free of charge. Ohio courts have continued to hold, however,

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[476] *Id.* §§ 2-102 (intestate succession), -201 (elective share), -301 (unintentionally omitted from will), -401 (homestead allowance), -402 (exempt property), -403 (family allowance).

[477] *Id.* § 2-802.

[478] *Id.*

[479] OHIO REV. CODE ANN. § 2103.05 (Page 1968); Mansfield v. McIntyre, 10 Ohio 28 (1840).

[480] Brown v. Kerns, 6 Ohio N.P. 68, 9 Ohio Dec. 112 (C.P. 1898).

[481] OHIO REV. CODE ANN. § 2117.24 (Page 1968); *In re* Estate of Lonz v. Glann, 66 Ohio App. 467, 35 N.E.2d 153 (1940).

that a surviving spouse cannot be deprived of the year's allowance[482] except when there is a divorce:[483] mere separation of husband and wife does not destroy the latter's right of exemption as a widow; but until they are divorced, the wife at the husband's death is entitled to a year's support and the articles of personal property mentioned in the statute.[484] Even though a culpable wife deserts her husband and remains apart from him for a long period of time, she is nevertheless entitled to the allowance if the marital relationship has not been terminated before the husband's death.[485]

It appears that marital misconduct will not defeat the right of a guilty surviving spouse to receive an intestate share nor bar him (or her) from taking against the will under the Ohio statute.[486] One Ohio court has held that the statute of descent and distribution operates automatically and that there are no exceptions arising from the relations that existed between a husband and wife. The fact that the wife is estranged from her husband, whether voluntarily or not, will not preclude her from inheriting from him.[487] Hence, it would appear that the Uniform Code is consistent with present Ohio law.

> Section 2-803 Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations.
>
> (a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer has predeceased the decedent.
>
> (b) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.
>
> (c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.
>
> (d) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

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482 OHIO REV. CODE ANN. § 2117.20 (Page 1968).

483 *In re* Diller, 5 Ohio N.P. 255, 6 Ohio Dec. 182 (P. Ct. 1896).

484 *In re* Estate of McMillan, 8 Ohio C.C.R. (n.s.) 294, 18 Ohio C. Dec. 645 (Cir. Ct. 1906).

485 *In re* Estate of Clark, 99 Ohio App. 458, 125 N.E.2d 917 (1955).

486 OHIO REV. CODE ANN. § 2107.39 (Page 1968).

487 White v. Schwab, 29 Ohio L. Abs. 229, 235 (Ct. App. 1939). *But see* Edgar v. Richardson, 33 Ohio St. 581, 31 Am. R. 571 (1878).

(e) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing the Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(f) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.][488]

States have taken various positions, either by statute or case law, on the issue of whether one who has intentionally killed the person from whom he is taking property, either testate or intestate, may keep it. One view is that title passes to the slayer and he may retain it regardless of his crime. The rationale is that one's right to inherit is fixed by statute and it is the legislature which must provide an exception, not the courts.[489] Another position, which is that the slayer cannot take at all, is based upon the equitable principle that no one should be permitted to take advantage of or profit from his own wrongdoing.[490] A third view is that title passes to the slayer, but he holds it as a constructive trustee for the heirs or next of kin of the decedent.[491] Many states have passed legislation to prevent the slayer from taking title to the property.[492] The relevant Ohio statute[493] provides that a person convicted of murder in the first or second degree shall not inherit from or take the property of the person whom he killed. In such cases, property passes as though the slayer had predeceased the person killed. The Ohio statute has no application unless the slayer is convicted of murder in the first or second degree. A conviction of first degree manslaughter, for example, will not prevent one from inheriting or taking property,[494] thus the Uniform Code would change Ohio law in that respect. The Uniform Code[495] requires, in the alternative, either a conviction for felo-

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488 Section 2-803 is bracketed to indicate that the section is merely suggested as distinguished from being recommended as uniform. 2 UNIFORM PROBATE CODE NOTES (Oct. 1972).

489 Wall v. Pfanschmidt, 265 Ill. 180, 106 N.E. 785 (1914); *In re* Estate of Duncan, 40 Wash. 2d 850, 246 P.2d 445 (1952).

490 Weaver v. Hollis, 247 Ala. 57, 22 So.2d 525 (1945); Price v. Hitaffer, 164 Md. 505, 165 A. 470 (Ct. App. 1933).

491 Kelley v. State, 105 N.H. 240, 196 A.2d 68 (1963); *In re* Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966); RESTATEMENT OF RESTITUTION § 187(2) (1937).

492 T. Atkinson, *supra* note 70, § 37 n.35.

493 OHIO REV. CODE ANN. § 2105.19 (Page 1968).

494 Wadsworth v. Siek, 23 Ohio Misc. 112, 50 Ohio Op. 2d 507, 254 N.E.2d 738 (P. Ct. 1970).

495 UNIFORM PROBATE CODE § 2-803(e).

nious and intentional killing, or, in the absence of a conviction, a finding by a probate court[496] that the killing was felonious and intentional. The official comment points out that under this section acquittal on the criminal charges does not necessarily mean the slayer may receive the inheritance or legacy. For example, he may be acquitted by a criminal court of the charge of murder, but if he claims a part of the decedent's estate, the probate court may relitigate the issue of his guilt for purposes of determining inheritance rights and may find that the killing was felonious and intentional. The official comment draws an analogy to the tax field, in which one may be acquitted of tax fraud in a criminal action and yet be found guilty of fraud in a civil proceeding.[497] This does not seem to be objectionable or violative of double jeopardy, since different considerations as well as different standards of proof exist in criminal and civil proceedings.[498]

Under the Uniform Code, since one need not be convicted in a criminal proceeding, the slayer who has subsequently committed suicide could also be barred from taking pursuant to a determination that the killing was felonious and intentional. This would not be true under present Ohio law, as state courts have held that the statute does not apply to one who commits suicide prior to a conviction.[499] The Uniform Code provision differs from present Ohio law on other points as well; for example, under the former[500] a joint tenancy is severed by the killing and the slayer cannot take the decedent's share by right of survivorship. In Ohio, the courts have held that the slayer is not divested of his vested interest in a joint tenancy, absent a statute to that effect.[501] Ohio courts have also held, however, that as a matter of public policy one should not benefit from his own wrongdoing. Thus a beneficiary under an insurance policy who murders the insured cannot recover on the policy.[502] In this situation, of course, the beneficiary has no vested interest in the proceeds of the policy, as distinguished from a joint owner in a joint and survivorship account, and this distinction is relied upon by the Ohio courts. Under the Uniform Code[503] the wrongdoer would be prohibited from taking in either situation.

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496 The probate court shall make its determination of whether the killing was felonious and intentional by the preponderance of the evidence.

497 UNIFORM PROBATE CODE § 2-803, Comment.

498 *See generally* Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 IOWA L. REV. 317 (1954); Horack, *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805 (1937).

499 Shuman v. Schick, 95 Ohio App. 413, 120 N.E.2d 330 (1953); Harrison v. Hillegas, 13 Ohio Op. 523, 28 Ohio L. Abs. 404 (P. Ct. 1939).

500 UNIFORM PROBATE CODE § 2-803(b).

501 Oleff v. Hodapp, 129 Ohio St. 432, 195 N.E. 838 (1935); Shuman v. Schick, 95 Ohio App. 413, 120 N.E.2d 330 (1953).

502 Neff v. Massachusetts Mutual Life Ins. Co., 158 Ohio St. 45, 107 N.E.2d 100 (1952); Filmore v. Metropolitan Life Ins. Co., 82 Ohio St. 208, 92 N.E. 26 (1910).

503 UNIFORM PROBATE CODE § 2-803(b)-(c).

Ohio law corresponds to the Uniform Code[504] since a slayer is not entitled to any benefits under Article II.[505] This would preclude him from taking the homestead, exempt property, or family allowance.[506] The Supreme Court of Ohio has held that the statute precludes a convicted murderer from the $2,500 set-off in the inventory of the decedent's estate (as property exempt from administration[507] under the Ohio statute[508]). Ohio's present legislation is in need of revision because of its poor drafting. The present statute allows the killer to profit from his crime in certain cases, and the slayer must be convicted of murder in the first or second degree before the statute applies. Also, a conviction for a lesser included offense is beyond the operation of the statute, even if the killing was felonious and intentional. Furthermore, if a killer commits suicide, it is unjust to allow property to pass to his heirs rather than to his victim's heirs.[509]

IX. CUSTODY AND DEPOSIT OF WILLS

Section 2-901 Deposit of Will With Court in Testator's Lifetime.

A will may be deposited by the testator or his agent with any Court for safekeeping, under rules of the Court. The will shall be kept confidential. During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will. A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible, and to assure that it will be resealed and left on deposit after the examination. Upon being informed of the testator's death, the Court shall notify any person designated to receive the will and deliver it to him on request; or the Court may deliver the will to the appropriate Court.

Ohio law allows a testator to deposit his will for safekeeping with the probate court.[510] The Ohio statutory counterpart is similar to the Uniform Code: both provide that the will is to be delivered only to the testator during his lifetime or to a person authorized in writing to receive it. While the Ohio statute requires that the written order be "proved by the oath of a subscribing witness,"[511] such is not the case under the Uniform Code.

The Uniform Code allows the conservator of a testator's estate to examine a deposited will. This would allow the conservator to have knowl-

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504 *Id.* § 2-803(a).

505 In Ohio the slayer must be convicted of murder in the first or second degree. He need not be convicted under the Uniform Code if there is a finding by a preponderance of the evidence that the killing was felonious and intentional.

506 UNIFORM PROBATE CODE §§ 2-401 (homestead allowance), -402 (exempt property), -403 (family allowance).

507 OHIO REV. CODE ANN. § 2115.13 (Page 1968).

508 Bauman v. Hogue, 160 Ohio St. 296, 116 N.E.2d 439 (1953). *Contra*, Tyack v. Tipton, 65 Ohio L. Abs. 397, 115 N.E.2d 29 (Ct. App. 1951).

509 See M. Sussman, *supra* note 16, at 21-22.

510 OHIO REV. CODE ANN. § 2107.08 (Page 1968).

511 *Id.*

edge of the testator's estate plan which may contain information necessary for deciding the advisability of changing or selling an incompetent testator's property. Ohio has no such provision, but does provide that a testator can name the persons to whom the will is to be delivered by using an endorsement on the wrapper. If no one so-named appears to demand the will within two months after notice of the testator's death, the court will publicly open the will and retain it until offered for probate. If the court that opens the will has proper jurisdiction, it gives notice to either the executor named in the will or some other persons immediately interested in it. If the jurisdiction belongs to another court, then the will is delivered to it.[512] The Uniform Code provision does not specifically indicate to whom the will should be delivered, but it does state that "the Court shall notify any person designated to receive the will and deliver it to him on request."[513] This appears to be in accord with the Ohio provision.

> Section 2-902 Duty of Custodian of Will; Liability.
>
> After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and if none is known, to an appropriate Court. Any person who wilfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who wilfully refuses or fails to deliver a will after being ordered by the Court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of Court.

Both the relevant Ohio statute[514] and the Uniform Probate Code impose a duty upon the person having custody of the testator's will to deliver it for probating. Both statutes provide that the person withholding the will is liable to any person aggrieved for the damages he may sustain because of his failure to do so. The Ohio statute provides for the incarceration of any person withholding a will until such person produces the instrument. The Uniform Code states that "for the purpose of compelling delivery [the person who wilfully refuses or fails to deliver a will] is subject to penalty for contempt of Court."[515] It further requires that the will shall be delivered for probate by the person having custody of it with "reasonable promptness." Ohio does not stipulate any time period during which a will must be delivered. Ohio does have a statutory provision,[516] however, which deals with the effect of withholding a will, an issue not covered by the Uniform Code. Under the Ohio law, any person who has knowledge of a will and, without reasonable cause, intentionally conceals or withholds

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512 *Id.*

513 UNIFORM PROBATE CODE § 2-901.

514 OHIO REV. CODE ANN. § 2107.09 (Page 1968).

515 UNIFORM PROBATE CODE § 2-902.

516 OHIO REV. CODE ANN. § 2107.10 (Page 1968).

it for three years, is deprived of any rights he may have had under that will. In such a case the property devised to the concealer descends to the other heirs of the testator, exclusive of the one who concealed the will.

X. CONCLUSION

The Uniform Probate Code is the culmination of the efforts of distinguished scholars and practitioners in the probate field. It represents the most modern and best thinking on the substantive rules of law that should govern the devolution of property at death, and it thus affords a sound basis for the revision of Ohio law.

The proposed patterns of distribution for intestate succession are a major improvement over present Ohio law. They reflect the probable wishes of the average decedent by favoring the surviving spouse, except in those cases in which there were children by a prior marriage. In most cases the Uniform Code will avoid the problems and costs of guardianships by keeping the property out of the hands of minor children, while at the same time protecting children of a previous marriage from being disinherited. It eliminates inheritance by distant collateral relatives, "laughing heirs" who have no real claim upon the decedent. It limits the application of the doctrine of advancements to those cases in which actual intent is shown. In this field the function of existing rules in particular cases frustrates, as often as it implements, the probable intention of a decedent. By comparison, the present Ohio law represents outmoded social policies designed to serve a social order long since passed. The drafting is a hodge-podge of ambiguous, antiquated language which continues to cause unnecessary litigation and to produce unintented results.

The adoption of the Uniform Code would be a splendid opportunity for Ohio to abolish both the remaining vestiges of dower and the "half and half" statute. Both are remnants of antiquated doctrines and continue to be potential clouds upon title to real property. The protection the Uniform Code provides for the surviving spouse and other members of the decedent's family is clearly superior to the present Ohio law. The existing Ohio statutes in this area are complicated, sometimes irrational, and of relatively little value to the intended beneficiaries.

As to the execution of wills, the major effect of the Uniform Code will be to relax the formal requirements necessary for the execution of a valid will. It is designed to implement the intent of the testator and avoid the rigidity of present rules. The elimination of oral wills would be of minor significance. The advantages of the self-proved will in eliminating the need for proof of execution after the death of the testator are obvious and should be popular with both the bar and the public. A similar reception should greet the provision allowing an unattested list separate from the will to dispose of certain types of personal property. With respect to the

revocation of wills, the Uniform Code will be an improvement over present law, particularly in relation to revocation by operation of law; the ambiguity of the Ohio statute would be replaced with a clear-cut revocation by subsequent divorce.

In the area of statutory construction the need for reform is perhaps less obvious, because properly drafted wills avoid these problems. However, as long as wills are written without professional advice, as many presently are (and this can only be encouraged by the practice of permitting holographic wills), there is a need for clear and concise rules for dealing with the problems that arise as a result of nonprofessional drafting. In this respect the Uniform Code provides better and more modern rules to prevent ademption by extinction, to determine whether a will exercises a power of appointment, and to provide for the construction of class gifts in terms of relationship. As a result of such rules, much litigation and accompanying costs would be eliminated and the harsh results of the common law rules could be avoided as well. Of final importance, the simplification of the language used by the Uniform Code—abandoning the clutter of archaic terms—will be greatly welcomed by anyone who has spent time laboriously plodding through present statutes.

The purpose of this article has been to compare the Uniform Code to present Ohio law, in the hope that it will foster in the organized bar, the individual lawyer, and the legislature an interest in adopting the Uniform Code in Ohio. As with any new law, and with law reform in general, much of the opposition results from a fear of the unknown. We are all more comfortable with the familiar than we are with the unfamiliar. It is hoped that this article will provide a better understanding of the Uniform Code. There are, of course, a few instances in which the Uniform Code could be improved, but these are minor and the need for uniformity is an important countervailing consideration. By contrast, present Ohio law has ambiguous and obsolete features, many of which are more likely to frustrate than to further a decedent's probate intent. On balance, the Uniform Code certainly deserves serious consideration by Ohio lawmakers.

APPENDIX

COMPARISON OF OHIO AND UNIFORM PROBATE CODE PATTERNS OF INTESTATE SUCCESSION*

OHIO LAW	UNIFORM PROBATE CODE
Case I: Children or Their Lineal Descendants But No Surviving Spouse.	
All to children or their lineal descendants per stirpes.	Same
Case II: Surviving Spouse and One Child of Decedent and Surviving Spouse.	
One-half to child or lineal descendants per stirpes, one-half to surviving spouse.	First $50,000 plus one-half of the balance of the intestate estate to surviving spouse, child takes the remaining one-half of balance.
Case III: Surviving Spouse and More Than One Child, All Being Children of Decedent and Surviving Spouse.	
One-third to surviving spouse, two-thirds to children equally, lineal descendants per stirpes.	First $50,000 plus one-half of the balance of the intestate estate to surviving spouse, children take the remaining one-half of balance equally.
Case IV: Surviving Spouse and Children, One or More of Whom Are Children of Decedent by a Prior Marriage.	
If more than one child, one-third to surviving spouse and two-thirds to children equally, lineal descendants per stirpes.	One-half to surviving spouse, one-half to decedents children equally, lineal descendants per stirpes.
Case V: Surviving Spouse and Parents But No Children.	
Three-fourths to surviving spouse and one-fourth to parents. If no parents all to the surviving spouse.	First $50,000 plus one-half of balance to the surviving spouse. Parents take one-half of balance. If no parents all to the surviving spouse.

* *See* text and notes 26-54 *supra*. These distributions are subject to homestead, exempt property and family allowances.