#L-602 6/17/81

Memorandum 81-27

Subject: Study L-602 - Probate Code (Intestate Succession - General Background)

Introduction

This is the first of a series of memorandums relating to intestate succession. It is intended to provide background materials that will be useful in the study of particular aspects of intestate succession law that will be considered in other memorandums.

Three exhibits are attached to this memorandum:

(1) Exhibit 1 - Probate Code §§ 200-258 (California intestate succession provisions).

(2) Exhibit 2 - Uniform Probate Code Sections 2-101 through 2-114 (UPC intestate succession provisions).

(3) Exhibit 3 - Empirical Study (published in 1978 at the behest of the American Bar Foundation) concerning popular preferences with respect to distribution of property on death.

You should read the attached study (Exhibit 3) carefully. In addition to the empirical data, the study outlines the provisions of the statutes of the various states that relate to particular aspects of intestate succession. The study will give you a good overall view of the significant problems in intestate succession law.

The staff memorandums on intestate succession law will examine the existing California law, compare the existing law with the applicable portions of the Uniform Probate Code, and identify various policy issues and the considerations relevant to resolving those issues. This will permit the Commission to develop legislation to modernize this portion of the California Probate Code.

There is a wealth of published material concerning statutory reform of the law of wills and intestate succession. Two of the most helpful articles are Niles, Probate Reform in California, 31 Hast. L.J. 185 (1979), and French & Fletcher, A Comparison of the Uniform Probate Code and California Law With Respect to the Law of Wills, in Comparative Probate Law Studies 331 (1976). Professors Niles and French are both

consultants to the Commission on probate law. (Professor Dukeminier is a third consultant on probate law.)

Professor Niles has urged that it would be better to repeal most of the California statutory law of intestate succession and to start anew with a simpler, more contemporary code such as the UPC as the basis for reform. Niles, supra at 216.

Empirical Studies Concerning Popular Preferences for Distribution of Property on Death

The basic purpose of an intestate succession statute is to provide suitable rules for the person of modest means who relies on the estate plan provided by law. General Comment to Part 1 of Article II of UPC. Such a statute should provide for a distribution that the average decedent probably would have wanted if an intention had been expressed by will. Niles, supra at 200.

A number of empirical studies have been published which indicate popular preferences with respect to distribution of property on death. Prior to 1978, the major empirical studies involved the patterns of distribution found in probated wills, the assumption being that intestate decedents would have similar preferences. See Niles, supra at 192 n.47. These studies are described briefly in Exhibit 3 at 332-33. In 1978, the American Bar Foundation Research Journal published the results of a scientifically-designed telephone survey of 750 families in Alabama, California, Massachusetts, Ohio, and Texas. See Fellows, Simon & Rau, Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. Bar Foundation Research J. 321 (1978) (Exhibit 3). The results of this study and the prior studies of probated wills will be referred to in connection with particular aspects of intestate succession law.

The Case for National Uniformity of Intestate Succession Law

In a published rebuttal to criticism of the UPC by the California State Bar, the Joint Editorial Board for the UPC has said that:

> [L]ocal rules of heirship should be brought into line with uniform national standards. Statutory provisions governing intestate devolution provide the framework for the law's estate plan. Mobile Americans are more likely to be served by uniform rules of heirship, than by one or another views from

particular states to the effect that residents there intend what the local rules always have provided.

The American Bar Foundation study (Exhibit 3), however, does indicate some geographical differences in popular preferences regarding distribution of decedents' estates. See Fellows, Simon & Rau, supra at 361-62. The study noted:

> [T]hese findings raise some doubt concerning the appropriateness of a uniform intestate succession statute as promulgated in the UPC. If the intestacy statute should mirror the probable distributive preferences of intestate decedents, uniformity among the states may not be appropriate. Before any such conclusion can be made, however, further empirical research similar to this study of other regions in the country is necessary.

Id.

The evidence appears to be that most lay persons do not have an accurate understanding of what intestate succession statutes actually provide. When asked, "What are your reasons for not having a will," most persons cited "laziness" as the primary reason. No respondents indicated that they thought the intestacy statute of their states provided a satisfactory disposition. Id. at 339-40. Thus, idiosyncratic local rules of distribution would generally not operate to frustrate reliance by new residents of the state on what the rules are thought to provide.

However, the rules of intestacy govern not only the situation where the decedent has died without a will: Many wills and trust instruments contain gifts to "heirs" as determined by statutes of intestate succession, and the disposition of some substantial estates in California have been determined in this way. Niles, supra at 202; see Maud v. Catherwood, 67 Cal. App.2d 636, 155 P.2d 111 (1945) (containing the famous error in the trust created by Chief Justice S. Clinton Hastings). These instruments are generally prepared by lawyers who are in a position to advise their clients of what the rules of intestacy provide. Reliance does seem important in this situation. In view of the mobility of modern Americans as the Joint Editorial Board for the UPC suggests, nationally-uniform rules for intestate succession seem desirable.

This, of course, does not require blind adherence to the UPC. The UPC itself provides alternative provisions in a number of instances.

Moreover, some of the UPC provisions are intention-defeating in order to serve other important public policies (such as protection for members of the decedent's family). Thus in California we must weigh the need for uniform national rules of succession against our independent judgment of sound public policy.

Respectfully submitted,

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Exhibit 1

Division 2
SUCCESSION

	Section
Succession Defined	200
Chapter	
1. Community Property	201
2. Separate Property	220
3. Inheritance Rights of Aliens [Repealed]	259

§ 200. Succession defined

Succession is the acquisition of title to the property of one who dies without disposing of it by will. (Stats.1931, c. 281, § 200.)

Cross References

Acquisition of property by succession, see Civil Code § 1000.
Administration of estates of decedents, see § 300 et seq.
Disclaimer of testamentary and other interests, see § 190 et seq.
Illegitimate children, succession to estate, see § 255.
Partner's right to specific partnership property, see Corporations Code § 15025.
Tribal marriages and divorces, effect upon laws of succession, see Civil Code § 5138.
Wills, generally, see § 20 et seq.

CHAPTER 1. COMMUNITY PROPERTY

Sec.
201. Title of surviving spouse; portion subject to testamentary disposition or succession.
201.5. Property acquired while domiciled out of state or in exchange therefor; surviving spouse's share; disposition of other share.
201.6. Death of non-domiciliary leaving will disposing of non-community realty in state; election of surviving spouse.
201.7. Election of surviving spouse to take under or against will.
201.8. Restoration to decedent's estate of property in which surviving spouse had expectancy.
202. Death of spouse; passage of property to survivor; law governing; administration.
202. Death of spouse; passage of property to survivor; law governing; administration.
203. Surviving spouse's, etc. power over property; notice of claim by another under decedent's will, status of property.
204. Dispositions other than to surviving spouse; law governing administration and disposal.
205. Personal liability for debts; exceptions.
206. Community property held in certain revocable trusts.

§ 201. Title of surviving spouse; portion subject to testamentary disposition or succession

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. (Stats.1931, c. 281, § 201. Amended by Stats.1935, c. 831, § 2.)

OFFICIAL FORMS

Community Property Order and Order Approving Fees, see Forms set out following § 655.

Community Property Petition and Petition for Approval of Fees, see Forms set out following § 650.

Cross References

Community property,
Acquired from predeceased spouse, inheritance from surviving spouse, see § 228.
Defined, see Civil Code § 687.
Determination or confirmation, see § 650 et seq.
Disposition of estates without administration, see Probate Code § 650 et seq.
Disposition upon divorce, see Civil Code §§ 4800, 4810.
Inheritance tax on, see Revenue and Taxation Code § 13551 et seq.
Interests of spouses, defined, see Civil Code § 5105.
Orders determining status, see § 655.
Powers, duties, management and control over, see §§ 202, 203, 1435.1 et seq.; Civil Code §§ 5125, 5127.
Presumptions and limitations of action as to property acquired by wife, see Civil Code § 5110.
Simultaneous death, manner of distribution, see § 296.4.
Subject to debts and administration, see § 202.
Testamentary capacity required for disposal, see § 21.
Quasi-community property, defined, see Civil Code § 4803.
Separate property,
Damages paid by one spouse to other for personal injuries, see Civil Code § 5109.
Determination, see Civil Code §§ 5107, 5108.
Succession, see § 220 et seq.
Tribal marriages and divorces, effect upon laws of succession, see Civil Code, § 5138.

§ 201.5. Property acquired while domiciled out of state or in exchange therefor; surviving spouse's share; disposition of other share

Upon the death of any married person domiciled in this state, one-half of the following property in his or her estate shall belong to the surviving spouse and the other one-half of such property is subject to the testamentary disposition of the decedent, and, in the absence thereof, goes to the surviving spouse subject to the provisions of Sections 202 and 203:

(a) All personal property wherever situated, and all real property situated in this state, heretofore or

hereafter acquired by the decedent while domiciled elsewhere which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time of its acquisition.

(b) All personal property wherever situated, and all real property situated in this state, heretofore or hereafter acquired in exchange for real or personal property, wherever situated, which would have been the community property of the decedent and the surviving spouse if the decedent had been domiciled in this state at the time the property so exchanged was acquired.

All such property is subject to the debts of the decedent as provided by law.

As used in this section, personal property does not include and real property does include, leasehold interests in real property.

For purposes of this chapter, and for purposes of Article 3 (commencing with Section 650) of Chapter 10 of Division 3, the property defined in this section shall be known as "quasi-community property."
(Added by Stats.1935, c. 831, § 1. Amended by Stats.1957, c. 490, § 1; Stats.1961, c. 636, § 22; Stats.1970, c. 312, § 4; Stats.1980, c. 955, § 1.)

§ 201.6. Death of non-domiciliary leaving will disposing of non-community realty in state; election of surviving spouse

Upon the death of any married person not domiciled in this State who leaves a valid will disposing of real property in this State which is not the community property of the decedent and the surviving spouse, the surviving spouse has the same right to elect to take a portion of or interest in such property against the will of the decedent as though the property were situated in the decedent's domicile at death. As used in this section real property includes leasehold interests in real property.
(Added by Stats.1957, c. 490, § 2.)

§ 201.7. Election of surviving spouse to take under or against will

Whenever a decedent has made provision by a valid will for the surviving spouse and the spouse also has a right under Section 201.5 of this code to take property of the decedent against the will, the surviving spouse shall be required to elect whether to take under the will or to take against the will unless it appears by the will that the testator intended that the surviving spouse might take both under the will and against it.
(Added by Stats.1957, c. 490, § 3.)

§ 201.8. Restoration to decedent's estate of property in which surviving spouse had expectancy

Whenever any married person dies domiciled in this State who has made a transfer to a person other than the surviving spouse, without receiving in exchange a consideration of substantial value, of property in which the surviving spouse had an expectancy under Section 201.5 of this code at the time of such transfer, the surviving spouse may require the transferee to restore to the decedent's estate one-half of such property, its value, or its proceeds, if the decedent had a substantial quantum of ownership or control of the property at death. If the decedent has provided for the surviving spouse by will, however, the spouse cannot require such restoration unless the spouse has made an irrevocable election to take against the will under Section 201.5 of this code rather than to take under the will. All property restored to the decedent's estate hereunder shall go to the surviving spouse pursuant to Section 201.5 of this code as though such transfer had not been made.
(Added by Stats.1957, c. 490, § 4.)

§ 202. Death of spouse; passage of property to survivor; law governing; administration

Text of section operative until January 1, 1981

(a) Except as provided in Section 204, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her interest in the community property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 203 and 205, and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse, the interest of the deceased spouse in the community property or both the interest of the deceased spouse and the surviving spouse in the community property may be administered under Division 3 (commencing with Section 300). The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property transferred by the surviving spouse or his or her personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

(Added by Stats.1974, c. 11, § 2. Amended by Stats.1974, c. 752, § 5; Stats.1975, c. 173, § 2; Stats.1979, c. 730, § 98; Stats.1979, c. 731, § 1.)

For text of section operative January 1, 1981, see § 202, post.

§ 202. Death of spouse; passage of property to survivor; law governing; administration

Text of section operative January 1, 1981

(a) Except as provided in Section 204, when a husband or wife dies intestate, or dies testate and by his or her will bequeaths or devises all or a part of his or her interest in the community property or quasi-community property to the surviving spouse, it passes to the survivor subject to the provisions of Sections 203 and 205, and no administration is necessary.

(b) Notwithstanding subdivision (a), upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse, the interest of the deceased spouse in the community property or quasi-community property or both, the interest of the deceased spouse and the surviving spouse in the community property or quasi-community property, or both, may be administered under Division 3 (commencing with Section 300). The election must be made within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse and prior to the entry of an order under Section 655.

(c) Notwithstanding subdivision (a) or (b), the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse may file an election and agreement in the proceedings for the administration of the estate of the deceased spouse to have all or part of the interest of the surviving spouse in the community property or quasi-community property transferred by the surviving spouse or his or her personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the decree of final distribution in the proceedings.

(Added by Stats.1974, c. 11, § 2. Amended by Stats.1974, c. 752, § 5; Stats.1975, c. 173, § 2; Stats.1979, c. 730, § 98; Stats.1979, c. 731, § 1; Stats.1979, c. 731, § 1.1; Stats.1980, c. 955, § 2.)

For text of section operative until January 1, 1981, see § 202, ante.

Former § 202 was repealed by Stats.1974, c. 11, § 1.

Cross References

Community and separate property in general, see § 1435.1 et seq.; Civil Code § 5105 et seq.

Community property, necessity of petition to determine or confirm where election has been made to have interests in property administered under Division 3, see § 650.

§ 203. Surviving spouse's, etc. power over property; notice of claim by another under decedent's will; status of property

After 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the property of the surviving spouse shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community or quasi-community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property is claimed by another under the will of the deceased spouse. The notice must also (1) describe the property in which an interest is claimed, and (2) set forth the name or names of the owner or owners of the record title to the property. There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of the record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be as free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(Stats.1931, c. 281, § 203. Amended by Stats.1945, c. 1028, § 1; Stats.1974, c. 11, § 3; Stats.1974, c. 752, § 6; Stats. 1975, c. 173, § 3; Stats.1980, c. 955, § 3.)

§ 204. Dispositions other than to surviving spouse; law governing administration and disposal

When a deceased spouse disposes by will of all or part of his or her interest in the community property or quasi-community property to someone other than the surviving spouse or when the will of a deceased spouse contains a trust or limits the surviving spouse to a qualified ownership in the property, that part of the interest of the deceased spouse in the community property or quasi-community property disposed of to someone other than the surviving spouse, disposed of in trust, or limiting the surviving spouse to a qualified ownership in the property shall be subject to administration under Division 3 (commencing with Section 300). A will that provides for a devise or bequest of community property or quasi-community property to the surviving spouse if such spouse survives the deceased spouse by a specified period of time shall not be considered to create such a qualified ownership as to fall within the provision of this section, if the specified period of time has expired.

(Added by Stats.1974, c. 11, § 5. Amended by Stats.1974, c. 752, § 7; Stats.1975, c. 173, § 4; Stats.1977, c. 334, § 1; Stats.1980, c. 955 § 4.)

Former § 204 was repealed by Stats.1974, c. 11, § 4. See, now, § 206.

§ 205. Personal liability for debts; exceptions

(a) Except as provided by Section 951.1, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the community property and the debts of the deceased spouse chargeable against the separate property of the deceased spouse to the extent such separate property is characterized as quasi-community property under Section 201.5 by the provisions of Title 8 (commencing with Section 5100) of Part 5 of Division 4 of the Civil Code, unless the interests of both spouses in the community property or quasi-community property, or both, are administered under Division 3 (commencing with Section 300). The personal liability shall not exceed the value at the date of death, less the amount of any liens and encumbrances, of the interest of the surviving spouse (1) in the community property immediately prior to the death and (2) in quasi-community property arising by virtue of the death which is not exempt from execution plus the interest of the deceased spouse in such property passing to the surviving spouse without administration.

(b) If proceedings are commenced in this state for the administration of the estate of the deceased spouse and notice to creditors has been given by the personal representative, any action upon the liability of the surviving spouse pursuant to subdivision (a) shall be barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3 except as to the following:

(1) Creditors who had commenced judicial proceedings for the enforcement of the debts and had served the surviving spouse with process prior to the date of the last publication of the notice to creditors.

(2) Creditors who secure the acknowledgment in writing of the liability of the surviving spouse for the debts.

(3) Creditors who file a timely claim in the proceedings.

(c) Except as provided by subdivision (b), any debt described in subdivision (a) may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died. In any action based upon the debt, the surviving spouse may assert any defenses, counterclaims, or setoffs which would have been available to the deceased spouse if the deceased spouse had not died.

(Added by Stats.1974, c. 11, § 6. Amended by Stats.1974, c. 752, § 8; Stats.1975, c. 173, § 5; Stats.1976, c. 1079, § 59; Stats.1980, c. 955, § 5.)

§ 206. Community property held in certain revocable trusts

Notwithstanding the provisions of Sections 201, 202, 203, 204 and 205, community property held in a revocable trust described in Section 5113.5 of the Civil Code shall be governed by the provisions, if any, in the trust for disposition in the event of death.

(Added by Stats.1974, c. 11, § 7.)

CHAPTER 2. SEPARATE PROPERTY

Article		Section
1.	Particular Provisions	220
2.	Escheat of Decedents' Property	231
3.	General Provisions	250

ARTICLE 1. PARTICULAR PROVISIONS

Sec.
220. Succession controlled by contract and code.
221. Distribution to surviving spouse and issue.

Sec.
222. Distribution to issue where no surviving spouse.
223. Distribution to surviving spouse and immediate family where no issue.
224. Distribution to surviving spouse where neither issue nor immediate family.
225. Distribution to immediate family where neither issue nor spouse.
226. Distribution to next of kin where no spouse, issue, nor immediate family.
227. Unmarried minor decedent.
228. Distribution of community and other property acquired from predeceased spouse where no surviving spouse or issue.
229. Distribution of portion of decedent's estate attributable to decedent's predeceased spouse; decedents leaving neither issue nor spouse; escheat.
230. Distribution to next of kin of property acquired from previously deceased spouse.

§ 220. Succession controlled by contract and code

The separate property of a person who dies without disposing of it by will is succeeded to and must be distributed as hereinafter provided, subject to the limitation of any marriage or other contract, and to the provisions of section 201.5 and Division 3 of this code.

(Stats.1931, c. 281, § 220. Amended by Stats.1935, c. 831, § 3.)

Cross References

Contracts of spouses with each other, see Civil Code §§ 4802, 5103.
Damages paid by one spouse to other for personal injuries, separate property, see Civil Code § 5109.
Distribution of small estates to surviving spouse or children, see § 640 et seq.
Earnings and accumulations after judgment decreeing legal separation decreeing legal separation as separate property, see Civil Code § 5119.
Earnings of spouse and minor children, when living apart, as separate property, see Civil Code § 5118.
Effect of recording separate personal property, see Civil Code § 5115.
Homestead and exempt property, see § 660 et seq.
Husband's separate property, see Civil Code § 5108.
Inventory of separate personal property, recording, see Civil Code § 5114.
Liability of separate property of wife, see Civil Code § 5121.
Marriage settlements, see Civil Code § 5133.
Non-liability of spouse's earnings and separate property for other spouse's premarital debts, see Civil Code § 5120.
Non-liability of spouse's separate property for certain secured debts, see Civil Code § 5123.
Passage of title to decedent's property, possession of administrator, charges, see § 300.
Persons entitled to letters of administration, order of priority, see § 422.
Presumptions as to property acquired by wife, see Civil Code § 5110.
Property rights of the parties, see Civil Code § 4800 et seq.
Sole traders, married women as, see Code of Civil Procedure § 1811 et seq.
Tribal marriages and divorces, effect upon laws of succession, see Civil Code § 5138.
Uniform Parentage Act, see Civil Code § 7000 et seq.
Wife's separate property, see Civil Code § 5107.
Will, disposal of separate property, see § 20.

§ 221. Distribution to surviving spouse and issue

If the decedent leaves a surviving spouse, and only one child or the lawful issue of a deceased child, the estate goes one-half to the surviving spouse and one-half to the child or issue. If the decedent leaves a surviving spouse, and more than one child living or one child living and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation.

(Stats.1931, c. 281, § 221.)

Cross References

General provisions, see § 250 et seq.

§ 222. Distribution to issue where no surviving spouse

If the decedent leaves no surviving spouse, but leaves issue, the whole estate goes to such issue; and if all of the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take by right of representation.

(Stats.1931, c. 281, § 222.)

Cross References

General provisions, see § 250 et seq.

§ 223. Distribution to surviving spouse and immediate family where no issue

If the decedent leaves a surviving spouse and no issue, the estate goes one-half to the surviving spouse and one-half to the decedent's parents in equal shares, or if either is dead to the survivor, or if both are dead to their issue and the issue of either of them, by right of representation.

(Stats.1931, c. 281, § 223.)

Cross References

General provisions, see § 250 et seq.

§ 224. Distribution to surviving spouse where neither issue nor immediate family

If the decedent leaves a surviving spouse and neither issue, parent, brother, sister, nor descendant of a deceased brother or sister, the whole estate goes to the surviving spouse.

(Stats.1931, c. 281, § 224.)

Cross References

General provisions, see § 250 et seq.

§ 225. Distribution to immediate family where neither issue nor spouse

If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation.

(Stats.1931, c. 281, § 225.)

Cross References

General provisions, see § 250 et seq.

§ 226. Distribution to next of kin where no spouse, issue, nor immediate family

If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

(Stats.1931, c. 281, § 226.)

Cross References

General provisions, see § 250 et seq.

§ 227. Unmarried minor decedent

If the decedent dies under age without having been married, all the estate that came to the decedent by succession from a parent goes in equal shares to the other children of the same parent and to the issue of any other of such children who are dead, by right of representation; or if all the children of such parent are dead, and any of them has left issue, to such issue; and if all the issue are in the same degree of kindred to the decedent, they share equally, otherwise they take by right of representation.

(Stats.1931, c. 281, § 227.)

Cross References

Age of person able to make will, see § 20.
General provisions, see § 250 et seq.

§ 228. Repealed by Stats.1980, c. 136, § 1

§ 229. Distribution of portion of decedent's estate attributable to decedent's predeceased spouse; decedents leaving neither issue nor spouse; escheat

(a) If the decedent leaves no living spouse or issue and there are issue of the decedent's predeceased spouse, the portion of the decedent's estate attributable to the decedent's predeceased spouse shall go in equal shares to the children of the predeceased spouse and to their descendants by right of representation, and if none, then to the parents of the predeceased spouse, in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the predeceased spouse and to their descendants by right of representation.

(b) For the purposes of this section, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" shall mean:

(1) One-half of the community property in existence at the time of the death of the predeceased spouse.

(2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, devise, or bequest.

(3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(4) That portion of any property which, because of the death of the predeceased spouse, became vested in the decedent and was set aside as a probate homestead.

(5) Any separate property of the predeceased spouse which came to the decedent by gift, descent, devise, or bequest of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

(c) Notwithstanding subdivision (a), if the decedent leaves neither issue nor spouse, that portion of the decedent's estate created by gift, descent, devise, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent who made such gift, devise, or bequest or from whom the property descended, or if such parent or grandparent is dead, such property shall go in equal shares to the heirs of such deceased parent or grandparent.

(d) That portion of the decedent's estate not otherwise subject to this section shall be distributed pursuant to the provisions of this article, except that if a portion of the decedent's estate would otherwise escheat to the state because there is no relative, including next of kin, such portion of the estate shall be distributed as provided by subdivision (a) along with any portion of the decedent's estate attributable to the decedent's predeceased spouse.

(e) If any of the property subject to the provisions of this section would otherwise escheat to this state because there is no relative, including next of kin, of one of the spouses to succeed to such portion of the estate, such property shall be distributed in accordance with the provisions of Section 296.4.

(Stats.1931, c. 281, § 229. Amended by Stats.1939, c. 1065, § 2; Stats.1970, c. 511, § 1; Stats.1976, c. 649, § 1; Stats. 1979, c. 298, § 2; Stats.1980, c. 136, § 2.)

Cross References

Adopted children, inheritance rights, see § 257.
Definitions,
  Collateral consanguinity, see § 253.
  Lineal consanguinity, see § 252.
  Right of representation, see § 250.
Causing death of decedent, succession prohibited, see § 258.
Community property,
  Generally, see § 201 et seq.
  Contracts of spouse, liability, see Civil Code § 5116.
  Definition, see Civil Code §§ 687, 5110.
  Disposition by will, see § 21.
  Disposition on divorce or separate maintenance, see Civil Code § 4800 et seq.
  Inheritance tax, see Revenue and Taxation Code § 13551 et seq.
  Interests of parties, defined, see Civil Code § 5105.
  Management and control, see Civil Code §§ 5125, 5127.
  Partnership property, see Corporations Code § 15025(e).
  Presumptions regarding, see Civil Code § 5110.
  Subject to support and education of children, see Civil Code § 4807.
  Simultaneous death, see § 294.6 et seq.
  Surviving husband's power over property, notice of claim of interest under wife's will, see § 203.
  Title of surviving spouse, portion subject to testamentary disposition or succession, see § 201.
Decedent's property, passage of title, see § 300.
Degree of kindred, determination, see § 251.
Distribution to next of kin of property acquired from previously deceased spouse, see § 230.
Homestead property, administration of estates, see § 660 et seq.
Illegitimate children,
  Inheritance rights, see § 255.
Inventory of estate, community and separate property, see § 601.
Kindred of half-blood, inheritance rights, see § 254.
Separate and community property, see Civil Code § 5105 et seq.
Separate property,
  Husband, see Civil Code § 5108.
  Wife, see Civil Code § 5107.

§ 230. Distribution to next of kin of property acquired from previously deceased spouse

If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, such portion goes to the next of kin of the decedent in the manner hereinabove provided for succession by next of kin.

(Stats.1931, c. 281, § 230.)

Cross References

Adopted children, inheritance rights, see § 257.
Definitions,
  Collateral consanguinity, see § 253.
  Lineal consanguinity, see § 252.
Degree of kindred, determination, see § 251.
Illegitimate children,
  Inheritance rights, see § 255.
Kindred of half-blood, inheritance rights, see § 254.
Right of representation, see § 250.
Succession, definition, see § 200.

ARTICLE 2. ESCHEAT OF DECEDENTS' PROPERTY

Sec.
231. Grounds; charges and trusts; moneys held in trust for health and welfare, etc., benefits.
232. Real property.
233. Tangible personal property wherever located.
234. Tangible personal property subject to control of superior court for purposes of administration.
235. Intangible personal property of decedent domiciled in state.
236. Intangible personal property subject to control of superior court for purposes of administration.

Article 2 was added by Stats.1968, c. 247, § 2.

Former Article 2. General Provisions, consisting of §§ 250 to 258, was renumbered Article 3 and amended by Stats.1968, c. 247, § 1.

§ 231. Grounds; charges and trusts; moneys held in trust for health and welfare, etc., benefits

(a) If a decedent, whether or not he was domiciled in this state, leaves no one to take his estate or any portion thereof by testate succession, and no one other than a government or governmental subdivision or agency to take his estate or a portion thereof by intestate succession, under the laws of this state or of any other jurisdiction, the same escheats at the time of his death in accordance with this article.

(b) Property passing to the state under this article, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to the provisions of Title 10 (commencing with Section 1300) of Part 3 of the Code of Civil Procedure relating to escheated estates.

(c) Notwithstanding any other provision of law, a benefit consisting of moneys or other property distributable from a trust established under a plan providing health and welfare, pension, vacation, severance, retirement benefit, death benefit, unemployment insurance or similar benefits shall not pass to the state or escheat to the state, but shall go to the trust or fund from which distributable. If, however, such plan has terminated and the trust or fund has been distributed to the beneficiaries thereof prior to distribution of such benefit from the estate, such benefit shall pass to the state and escheat to the state as provided herein.

(Stats.1931, c. 281, § 231 Amended by Stats.1951, c. 1708, § 35.1; Stats.1965, c. 2066, § 1; Stats.1968, c. 247, § 3; Stats.1972, c. 856, § 5.)

Cross References

Action to determine escheat under alien land law, see Code of Civil Procedure § 738.5.

Attorney General,
- Authority to commence action to determine state's right to property, see Code of Civil Procedure § 1421.
- Employment of counsel for investigation and recovery of property to which state may be entitled by escheat, see Government Code § 12542.
- Investigations and actions respecting escheated property, see Government Code §§ 12540, 12541.

Bail, payment into general fund of unclaimed deposit, see Penal Code § 1309.

Claims for money deposited in county or state treasuries, see § 1064.

Deposit in county treasury of amount of claim where claimant cannot be found, see § 738.

Deposits of assigned or distributed property with county treasurer for nonresidents, absentees, or minors, see § 1060.

Disposition of unclaimed property, generally, see Code of Civil Procedure § 1440 et seq.

Escheat proceedings in decedents' estates, see Code of Civil Procedure § 1420 et seq.

Failure to appear and claim vests property absolutely in state, see § 1027.

Money or property delivered under this section, presumption, handling, see Code of Civil Procedure § 1448.

Property rights of noncitizens, see Const. Art. 1, § 20.

Reversion of property to the people, see Government Code § 182.

Right of ownership, see Const. Art. 1, § 1.

Sale of unclaimed or rejected property, deposit of proceeds, see § 1062.

Simultaneous death, distribution of estate subject to this section, see § 296.4.

Unclaimed property act, see §§ 1064, 1148; Code of Civil Procedure § 1300 et seq.;
- Financial Code §§ 3121, 3150, 3160 et seq., 9073; Government Code § 13470;
- Penal Code §§ 5061 to 5066; Welfare and Institutions Code §§ 1015 to 1020, 4126 to 4131.

United States Code Annotated

Property rights of citizens of United States, see 42 U.S.C.A. § 1982.

§ 232. Real property

Real property in this state escheats to this state in accordance with Section 231.

(Added by Stats.1968, c. 247, § 4.)

§ 233. Tangible personal property wherever located

All tangible personal property owned by the decedent, wherever located at the decedent's death, that was customarily kept in this state prior to his death, escheats to this state in accordance with Section 231.

(Added by Stats.1968, c. 247, § 5.)

§ 234. Tangible personal property subject to control of superior court for purposes of administration

(a) Subject to subdivision (b), all tangible personal property owned by the decedent that is subject to the control of a superior court of this state for purposes of administration and disposition under Division 3 (commencing with Section 300) of this code escheats to this state in accordance with Section 231.

(b) The property described in subdivision (a) does not escheat to this state but goes to another jurisdiction if the other jurisdiction claims the property and establishes that:

(1) The other jurisdiction is entitled to the property under its laws;

(2) The decedent customarily kept the property in that jurisdiction prior to his death; and

(3) This state has the right to escheat and take tangible personal property being administered as part of a decedent's estate in that jurisdiction if the decedent customarily kept the property in this state prior to his death.

(Added by Stats.1968, c. 247, § 6.)

§ 235. Intangible personal property of decedent domiciled in state

All intangible property owned by the decedent escheats to this state in accordance with Section 231 if the decedent was domiciled in this state at the time of his death.

(Added by Stats.1968, c. 247, § 7.)

Cross References

Determination of residence and domicile, see Elections Code § 200 et seq.; Revenue and Taxation Code § 17014 et seq.; Welfare and Institutions Code § 17101.

Escheat of unclaimed personal property, see Code of Civil Procedure § 1510 et seq.

§ 236. Intangible personal property subject to control of superior court for purposes of administration

(a) Subject to subdivision (b), all intangible property owned by the decedent that is subject to the

control of a superior court of this state for purposes of administration and disposition under Division 3 (commencing with Section 300) of this code escheats to this state in accordance with Section 231 whether or not the decedent was domiciled in this state at his death.

(b) The property described in subdivision (a) does not escheat to this state but goes to another jurisdiction if the other jurisdiction claims the property and establishes that:

(1) The other jurisdiction is entitled to the property under its laws;

(2) The decedent was domiciled in that jurisdiction at his death; and

(3) This state has the right to escheat and take intangible property being administered as part of a decedent's estate in that jurisdiction if the decedent was domiciled in this state at his death.

(Added by Stats.1968, c. 247, § 8.)

Cross References

Determination of residence and domicile, see Elections Code § 200 et seq.; Revenue and Taxation Code § 17014 et seq.; Welfare and Institutions Code § 17101.

ARTICLE 3. GENERAL PROVISIONS

The heading of former Article 2, consisting of §§ 250 to 258, was renumbered Article 3 and amended by Stats.1968, c. 247, § 1.

Sec.
250. Right of representation defined; posthumous child.
251. Degree of kindred; determination.
252. Lineal consanguinity; definition; division.
253. Collateral consanguinity; definition; computation of degrees.
254. Kindred of half-blood; inheritance rights.
255. Parent and child relationship; rights of succession; child and issue of deceased child of decedent; parent.
256. Repealed.
257. Adopted children; inheritance rights; restriction.
258. Causing death; succession prohibited.

Cross References

Inheritance tax, generally, see Revenue and Taxation Code § 13301 et seq.

§ 250. Right of representation defined; posthumous child

Inheritance or succession "by right of representation" takes place when the descendants of a deceased person take the same share or right in the estate of another that such deceased person would have taken as an heir if living. A posthumous child is considered as living at the death of the parent.

(Stats.1931, c. 281, § 250.)

Cross References

Afterborn children as members of a class, see § 123.
Children's or descendants' right to take upon death of devisee or legatee, see § 92.
Defeat of future interests by birth of posthumous child, see Civil Code § 739.
Future interests of posthumous children, see Civil Code § 698.
Inheritance tax, imposition and computation, see Revenue and Taxation Code § 13401 et seq.
Pretermitted posthumous children, see §§ 90, 91.
Succession, generally, see § 200.
Successors and their shares, see § 220 et seq.
Unborn child deemed an existing person, see Civil Code § 29.

§ 251. Degree of kindred; determination

The degree of kindred is established by the number of generations, and each generation is called a degree.

(Stats.1931, c. 281, § 251.)

Cross References

Computation of degrees of kinship, see §§ 252, 253.

§ 252. Lineal consanguinity; definition; division

Lineal consanguinity, or the direct line of consanguinity, is the relationship between persons one of whom is a descendant of the other. The direct line is divided into a direct line descending, which connects a person with those who descend from him, and a direct line ascending, which connects a person with those from whom he descends. In the direct line there are as many degrees as there are generations. Thus, the child is, with regard to the parent, in the first degree; the grandchild, with regard to the grandparent, in the second; and vice versa as to the parent and grandparent with regard to their respective children and grandchildren.

(Stats.1931, c. 281, § 252.)

Cross References

Successors and their shares, see § 221 et seq.

§ 253. Collateral consanguinity; definition; computation of degrees

Collateral consanguinity is the relationship between people who spring from a common ancestor, but are not in a direct line. The degree is established by counting the generation from one relative up to the common ancestor and from the common ancestor to the other relative. In such computation the first relative is excluded, the other included, and the ancestor counted but once. Thus, brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth, and so on.

(Stats.1931, c. 281, § 253.)

Cross References

Successors and their shares, see § 223 et seq.

§ 254. Kindred of half-blood; inheritance rights

Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance in favor of those who are.

(Stats.1931, c. 281, § 254.)

Cross References

Priority between relatives of whole blood and half blood in administration, see § 424.

§ 255. Parent and child relationship; rights of succession; child and issue of deceased child of decedent; parent

(a) The rights of succession by a child, as set forth in this division, are dependent upon the existence, prior to the death of the decedent, of a parent and child relationship between such child and the decedent.

(b) The rights of succession by issue through a deceased child of a decedent, as set forth in this division, are dependent upon the existence, prior to the death of the deceased child, of a parent and child relationship between such issue and a deceased child and upon the existence prior to the death of the decedent or the deceased child of a parent and child relationship between such deceased child and the decedent.

(c) The rights of succession to a child's estate by a parent and all persons who would take an intestate share of the decedent's estate through such parent, as set forth in this division, are dependent upon the existence, prior to the death of the decedent, of a parent and child relationship between the parent and the decedent child.

(d) For purposes of this division, a parent and child relationship exists where such relationship is (1) presumed and not rebutted pursuant to, or (2) established pursuant to, Part 7 (commencing with Section 7000) of Division 4 of the Civil Code.

(Added by Stats.1975, c. 1244, § 25.)

Former § 255 was repealed by Stats.1975, c. 1244, § 24.

Cross References

Birth certificate, amendment after acknowledgement of paternity, see Health and Safety Code § 10455 et seq.
Uniform Parentage Act, see Civil Code § 7000 et seq.
Action for declaration of parental relation, see Civil Code §§ 7006, 7015.
Annulled marriages and their effects on status of children, see Civil Code §§ 7004, 7010.
Presumption man is natural father, see Civil Code § 7004.

§ 256. Repealed by Stats.1975, c. 1244, § 26

Cross References

See, now, § 255.
Adoption, generally, see Civil Code § 221 et seq.
Distribution to surviving lawful issue, see § 221 et seq.

§ 257. Adopted children; inheritance rights; restriction

An adopted child shall be deemed a descendant of one who has adopted him, the same as a natural child, for all purposes of succession by, from or through the adopting parent the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by adoption, nor does such natural parent succeed to the estate of such adopted child, nor does such adopted child succeed to the estate of a relative of the natural parent, nor does any relative of the natural parent succeed to the estate of an adopted child.

(Stats.1931, c. 281, § 257. Amended by Stats.1955, c. 1478, § 1.)

Cross References

Adoption generally, see Civil Code § 221 et seq.
Succession by natural issue, see § 221 et seq.
Uniform Parentage Act, see Civil Code § 7000 et seq.
Establishment of parent and child relationship by adoption, see Civil Code § 7003.

§ 258. Causing death; succession prohibited

No person who has unlawfully and intentionally caused the death of a decedent, and no person who has caused the death of a decedent in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, Penal Code, shall be entitled to succeed to any portion of the estate or to take under any will of the decedent; but the portion thereof to which he would otherwise be entitled to succeed goes to the other persons entitled thereto under the provisions of

this chapter or under the will of the decedent. A conviction or acquittal on a charge of murder or voluntary manslaughter shall be a conclusive determination of the unlawfulness or lawfulness of a causing of death, for the purposes of this section. (Stats.1931, c. 281, § 258. Amended by Stats.1955, c. 1110, § 1; Stats.1963, c. 857, § 1.)

Cross References

Homicide, see Penal Code § 187.
Murder, defined, see Penal Code § 187.
Voluntary manslaughter, defined, see Penal Code § 192.
Lewd or lascivious acts upon body of child under 14, see Penal Code § 288.
Succession, generally, see § 200 et seq.

CHAPTER 3. INHERITANCE RIGHTS OF ALIENS

Chapter 3 was repealed by Stats.1974, c. 425, § 1.

§§ 259 to 259.2. Repealed by Stats.1974, c. 425, § 1

Exhibit 2

PART 1

INTESTATE SUCCESSION

GENERAL COMMENT

Part 1 of Article II contains the basic pattern of intestate succession historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personalty, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. 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.

A principal purpose of this Article and Article III of the Code is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law. For a discussion of this important aspect of the Code, see 8 Real Property, Probate and Trust Journal (Fall 1968) p. 199.

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive the decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare. The statute provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While the prescribed patterns may strike some as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be borne in mind that the decedent may always choose a different rule by executing a will.

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.

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], 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.

COMMENT

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this Article. Moreover, in the small estate (less than $50,000 after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwise passing to their minor children.

See Section 2-802 for the definition of spouse which controls for purposes of intestate succession.

ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES

[Section 2–102A. [Share of the Spouse.]

The intestate share of the surviving spouse is as follows:

(1) as to separate property

(i) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(ii) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;

(iii) 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;

(iv) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

(2) as to community property

(i) The one-half of community property which belongs to the decedent passes to the [surviving spouse].]

Section 2–103. [Share of Heirs Other Than Surviving Spouse.]

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:

(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;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the issue of the parents or either of them by representation;

(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.

COMMENT

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in Section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under Section 2-801.

In 1975, the Joint Editorial Board recommended replacement of the original text of subsection (8) which referred to "brothers and sisters" of the decedent, and to their issue. The new language is much simpler, and it avoids the problem that "brother" and "sister" are not defined terms. "Issue" by contrast is defined in Section 1-201(21). The definition refers to other defined terms, "parent" and "child", both of which refer to Section 2-109 where the effect of illegitimacy and adoption on relationships for inheritance purposes is spelled out.

The Joint Editorial Board gave careful consideration to a change in the Code's system for distribution among issue as recommended in Waggoner, "A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants," 66 Nw.U.L.Rev. 626 (1971). Though favored as a recommended change in the Code by a majority of the Board, others opposed on the ground that the original text had been enacted already in several states, and that a change in this basic section of the Code would weaken the case for uniformity of probate law in all states. Nonetheless, since some states as of 1975 had adopted versions of the Code containing deviations from the original text of this and related sections, it was the concensus that Prof. Waggoner's recommendation and the statutory changes that would be necessary to implement it, should be described in Code commentary.

The changes involved would appear in this section and in Section 2-106. The old and the revised text of these sections would be as follows if the Waggoner recommendation is accepted by an enacting state which decides that uniformity of the substantive rules of intestate succession is not vital:

Change Section 2-103(1), (3) and (4) by altering, in each

instance, the language referring to taking per capita or by representation, as follows:

2-103 . . .

(1) to the issue of the decedent; *to be distributed per capita at each generation as defined in Section 2-106;* ~~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;~~ . . .

(3) if there is no surviving issue or parent, to the issue of the parents or either of them *to be distributed per capita at each generation as defined in Section 2-106*; by ~~representation;~~

(4) . . . or to the issue of the paternal grandparents if both are deceased *to be distributed per capita at each generation as defined in Section 2-106;* ~~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.~~

Also, alter 2-106 as follows:

Section 2-106. [*Per Capita at Each Generation.*]

If per capita at each generation 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 *which contains any surviving heirs* and deceased persons in the same degree who left issue who survive the decedent, ~~e~~*E*ach surviving heir in the nearest degree *which contains any surviving heir is allocated one share and the remainder of the estate is divided in the same manner as if the heirs already allocated a share and their issue had predeceased the decedent.* ~~receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.~~

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.

COMMENT

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die

within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see Section 2-601. This section avoids multiple administrations and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-302 and 3-307 prevent informal probate of a will or informal issuance of letters for a period of five days from death. The last sentence prevents the survivorship requirement from affecting inheritances by the last eligible relative of the intestate who survives him for any period.

I.R.C. § 2056(b) (3) makes it clear that an interest passing to a surviving spouse is *not* made a "terminable interest" and thereby disqualified for inclusion in the marital deduction by its being conditioned on failure of the spouse to survive a period not exceeding six months after the decedent's death, if the spouse in fact lives for the required period. Thus, the intestate share of a spouse who survives the decedent by five days is available for the marital deduction. To assure a marital deduction in cases where one spouse fails to survive the other by the required period, the decedent must leave a will. The marital deduction is not a problem in the typical intestate estate. The draftsmen and Special Committee concluded that the statute should accommodate the typical estate to which it applies, rather than the unusual case of an unplanned estate involving large sums of money.

Section 2-105. [No Taker.]

If there is no taker under the provisions of this Article, the intestate estate passes to the [state].

Section 2-106. [Representation.]

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.

COMMENT

Under the system of intestate succession in effect in some states, property is directed to be divided "per stirpes" among issue or descendants of identified ancestors. Applying a meaning commonly associated with the quoted words, the estate is first divided

into the number indicated by the number of children of the ancestor who survive, *or* who leave issue who survive. If, for example, the property is directed to issue "per stirpes" of the intestate's parents, the first division would be by the number of children of parents (other than the intestate) who left issue surviving even though no person of this generation survives. Thus, if the survivors are a child and a grandchild of a deceased brother of the intestate and five children of his deceased sister, the brother's descendants would divide one-half and the five children of the sister would divide the other half. Yet, if the parent of the brother's grandchild also had survived, most statutes would give the seven nephews and nieces equal shares because it is commonly provided that if all surviving kin are in equal degree, they take per capita.

The draft rejects this pattern and keys to a system which assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members.

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.

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.

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 either natural parent.

(2) In cases not covered by Paragraph (1), a person is the child of its parents regardless of the marital status of its parents and the parent and child relationship may be established under the [Uniform Parentage Act].

Alternative subsection (2) for states that have not adopted the Uniform Parentage Act.

[(2) In cases not covered by Paragraph (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 participated 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, but the paternity established under this subparagraph 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.]

COMMENT

The definition of "child" and "parent" in Section 1-201 incorporates the meanings established by this section, thus extending them for all purposes of the Code. See Section 2-802 for the definition of "spouse" for purposes of intestate succession.

The change in 1975 from "that" to "either" as the third from the last word in subsection (1) was recommended by the Joint Editorial Board so that children would not be detached from any natural relatives for inheritance purposes because of adoption by the spouse of one of its natural parents. The change in this section, which is referred to by the definitions in Section 1-201 of "child", "issue" and "parent", affects, inter alia, the meaning of Sections 2-102, 2-103, 2-106, 2-302, 2-401, 2-402, 2-403, 2-404 and 2-605. As one consequence, the child of a deceased father who has been adopted by the mother's new spouse does not cease to be "issue" of his father and his parents, and so, under Section 2-605, would take a devise from one of his natural, paternal grandparents in favor of the child's deceased father who predeceased the testator. This situation is suggested by In re Estate of Bissell, 342 N.Y.S.(2d) 718.

The recommended addition of a new section, Section 2-114, dealing with the possibility of double inheritance where a person establishes relationships to a decedent through two lines of relatives is attributable, in part, to the change recommended in Section 2-109(1).

The approval in 1973 by the National Conference of Commissioners on Uniform State Laws of the Uniform Parentage Act reflects a change of policy by the Conference regarding the status of children born out of wedlock to one which is inconsistent with Section 2-109(2) of the Code as approved in 1969. The new language of 2-109(2) conforms the

Uniform Probate Code to the Uniform Parentage Act. In view of the fact that eight states have enacted the 1969 version of 2-109(2), the former language is retained, in brackets, to indicate that states, consistently with enactment of the Uniform Probate Code, may accept either form of approved language.

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

COMMENT

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift be an advancement. The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

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.

COMMENT

This supplements the content of Section 3–903, *infra*.

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.

COMMENT

The purpose of this section is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the King. Although there never was a corresponding rule as to personalty, the present section is phrased in light of the basic premise of the Code that distinctions between real and personal property should be abolished.

This section has broader vitality in light of the recent decision of the United States Supreme Court in Zschernig v. Miller, 88 S.Ct. 664, 389 U.S. 429, 19 L.Ed.2d 683 (1968) holding unconstitutional a state statute providing for escheat if a nonresident alien cannot meet three requirements: the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country, the right of United States citizens to receive payment here of funds from estates in the foreign country, and the right of the foreign heirs to receive the proceeds of the local estate without confiscation by the foreign government. The rationale was that such a statute involved the local probate court in matters which essentially involve United States foreign policy, whether or not there is a governing treaty with the foreign country. Hence, the statute is "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress".

[Section 2–113. [Dower and Curtesy Abolished.]

The estates of dower and curtesy are abolished.]

COMMENT

The provisions of this Code replace the common law concepts of dower and curtesy and their statutory counterparts. Those estates provided both a share in intestacy and a protection against disinheritance.

In states which have previously abolished dower and curtesy, or where those estates have never existed, the above section should be omitted.

Section 2–114. [Persons Related to Decedent Through Two Lines.]

A person who is related to the decedent through 2 lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.

COMMENT

This section was added in 1975. The language is identical to that appearing as Section 2–112 in U. P.C. Working Drafts 3 and 4, and as Section 2–110 in Working Draft 5. The section was dropped because, with adoptions serving to transplant adopted children from all natural relationships to full relationship with adoptive relatives, and inheritance eliminated as between persons more distantly related than descendants of a common grandparent, the prospects of double inheritance seemed too remote to warrant the burden of an extra section. The changes recommended in Section 2–109(1) increase the prospects of double inheritance to the point where the addition of Section 2–114 seemed desirable. The section would have potential application in the not uncommon case where a deceased person's brother or sister marries the spouse of the decedent and adopts a child of the former marriage; it would block inheritance through two lines if the adopting parent died thereafter leaving the child as a natural and adopted grandchild of its grandparents.

Exhibit 3

Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States

Mary Louise Fellows, Rita J. Simon, and William Rau

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Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States

Mary Louise Fellows, Rita J. Simon, and William Rau

Intestate succession statutes should reflect the distributive preferences of intestate decedents. To date, these distributive preferences could only be inferred from distributive patterns found in wills. This telephone survey of 750 persons living in Alabama, California, Massachusetts, Ohio, and Texas supplements prior will studies and provides new insights concerning public attitudes about property distribution at death. The distributive preferences of the respondents revealed few significant differences that could be attributed to age, education, income, wealth, or occupational status. Two other important findings of this study suggest that a modern intestacy statute should provide that (1) the surviving spouse inherit the entire estate in preference to the decedent's issue or family of orientation and (2) issue who are in the same generation share equally in the estate.

I. Introduction

Anglo-American law permits and encourages freedom of testation.[1] Except for death taxes and a few modest restrictions aimed at limiting

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1. See 2 W. Blackstone, Commentaries *10-13; 1 Richard T. Ely, Property and Contract in Their Relations to the Distribution of Wealth 425-27 (London: Macmillan & Co., 1914); Orrin K. McMurray, Modern Limitations on Liberty of Testation, in Rational Basis of Legal Institutions 452 (New York: Macmillan Co., 1923); W. H. Page, Page on the Law of Wills § 1.7, at 26-30 (Bowe-Parker rev. Cincinnati: W. H. Anderson Co., 1960) [hereinafter cited as Page]; David Hughes Parry, The Law of Succession, Testate and Intestate 2 (6th ed. London: Sweet & Maxwell Ltd., 1976); Lewis M. Simes, Public Policy and the Dead Hand 6-20 (Thomas M. Cooley Lectures; Ann Arbor: University of Michigan Law School, 1955); Lawrence M. Friedman, The Law of the Living, the Law of the Dead: Property, Succession, and Society, 1966 Wis. L. Rev. 340. See also notes 46-62 *infra* and accompanying text for further discussion of testamentary freedom.

excessive dead-hand control[2] and at protecting the nuclear family,[3] an individual can freely determine the disposition of wealth owned at death by executing a will.[4] In the absence of a will,[5] the laws of intestate succession determine who shall receive a decedent's property.[6] Intestacy statutes found in all states are derived from the English common law's canons of descent,[7] which determined inheritance of realty, and the English Statute of Distribution,[8] which determined inheritance of personalty.[9] Despite reliance on the same legal framework, the distributive patterns found in the American jurisdictions vary widely.[10]

> Each jurisdiction picking and choosing differently from prior experiences, injecting indigenous ingredients believed to be called for by local circumstances, has arrived at its own product. It is regrettable that the choices so made were so often unthinking borrowings rather than the product of new appraisals of utility and appropriateness. In consequence, the diversities can seldom be justified rationally, but they exist, and must be lived with....[11]

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2. E.g., The Rule Against Perpetuities. See John Chipman Gray, The Rule Against Perpetuities (4th ed. Roland Gray, ed. Boston: Little, Brown & Co., 1942).

3. E.g., pretermitted heir statutes, see, e.g., Uniform Probate Code § 2-302 (1977 version) [hereinafter cited as UPC], offer some protection to children of the decedent; dower, curtesy, and/or elective share provisions protect the surviving spouse. See, e.g., UPC §§ 2-201 through -207. In addition, the nuclear family is protected in some states through restrictions on bequests for charitable and religious purposes. See, e.g., Ga. Code § 113-107 (1975). Statutes providing for the family homestead and a small amount of personal property as well as temporary support during probate administration offer further protection. See, e.g., UPC §§ 2-401 through -404. Georgia protects the family through the following unique statutory provision:

> A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the State; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and, upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused.

Ga. Code § 113-106 (1975).

4. Arguably such formalities of will execution as witnesses and a writing can be viewed as a restriction on the freedom of testation, as can rules delineating legal capacity to make a will. Lawrence M. Friedman, The Law of Succession in Social Perspective, in Death, Taxes and Family Property: Essays and American Assembly Report 9, 14–15 (E. Halbach, Jr., ed. St. Paul: West Publishing Co., 1977); Friedman, *supra* note 1, at 358–59, 365.

5. Intestacy statutes operate not only when the decedent dies without a valid will but also when the will fails to dispose of all the probate assets. In the partial intestacy situation, the intestate succession statutes apply only to that property not disposed of by the will.

6. As a general rule, the law of the decedent's domicile at death governs succession to personal property, and the law of the situs of property governs succession to real property. Restatement (Second) of Conflict of Laws §§ 236, 260 (1971); Robert A. Leflar, American Conflicts of Law 397–400 (3d ed. Charlottesville, Va.: Bobbs-Merrill, Co., 1977).

7. Blackstone, *supra* note 1, at *208–34.

8. 22 & 23 Car. 2, ch. 10 (1670 & 1671).

9. See 7 Richard R. Powell, Powell on Real Property ¶ 993, at 639–44 (R. Rohan rev. ed. New York: Matthew Bender, 1977).

10. For arguments in favor of uniformity of state inheritance laws, including intestate succession, see William J. Fratcher, Toward Uniform Succession Legislation, 41 N.Y.U.L. Rev. 1037, 1038 (1966); Richard V. Wellman & James W. Gordon, Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments, 1976 B.Y.U.L. Rev. 357, 361–63.

11. 7 Powell, *supra* note 9, ¶ 994, at 644.

Promulgation of the Uniform Probate Code (UPC) by the National Conference of Commissioners on Uniform State Laws on August 7, 1969, and approval of the Code by the House of Delegates of the American Bar Association one week later[12] have served as a catalyst for reexamination of existing intestate succession laws.[13] Part I of Article II of the UPC concerns intestate succession. The pattern adopted is admittedly a product of the tradition and history that has influenced other intestacy statutes. The drafters of the UPC, however, were careful not to perpetuate historical rules they found to be inconsistent with modern attitudes. Their goal was to design a statute that reflects the dispository wishes of persons who die without wills.[14] To determine these dispository wishes, the drafters relied on prevailing will patterns as revealed from then recent studies[15] and the experience of the probate bar, whose members have helped all types of clients resolve a variety of problems connected with property disposition at death.[16] Reliance on these sources raises two inquiries:[17] (1) Why should the intestate succession statutes reflect the dispository wishes of intestate decedents? (2) Assuming that the dispository wishes of the decedent are relevant, how can they be most accurately ascertained?

Testamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent's bounty.[18] Moreover, unless the statutory scheme invoked

12. See 55 A.B.A.J. 976 (1969). Technical amendments were made to the code in 1975, and additions were made in 1977.

13. Ohio, for example, recently enacted a series of probate reforms that are based in part on provisions and concepts introduced by the UPC. See Donald L. Robertson, How the Family Fares: A Comparison of the Uniform Probate Code and the Ohio Probate Reform Act, 37 Ohio St. L.J. 321, 322 (1976).

14. UPC art. II, General Comment to pt. I.

15. See Marvin B. Sussman, Judith N. Cates & David T. Smith, The Family and Inheritance (New York: Russell Sage Foundation, 1970) [hereinafter cited as Sussman]; Allison Dunham, The Method, Process and Frequency of Wealth Transmission at Death, 30 U.Chi. L. Rev. 241 (1963); Edward H. Ward & J. H. Beuscher, The Inheritance Process in Wisconsin, 1950 Wis. L. Rev. 393; Report of the Committee on the Laws of Intestate Succession, England, CMD No. 8310 (1951). Although the Sussman study was not available to the drafters at the time the UPC was written, the drafters used the data of the study in presentations of the UPC to the National Commission on Uniform State Laws. Thomas J. Mulder, Intestate Succession Under the Uniform Probate Code, 3 Prospectus 301, at 304 n.10 (1970).

16. See Mulder, *supra* note 15, at 304 n.10; Richard V. Wellman, Selected Aspects of Uniform Probate Code, 3 Real Prop., Prob., & Tr. J. 199, 204 (1968).

17. See Julian R. Kossow, The New York Law of Intestate Succession Compared with the Uniform Probate Code: Where There's No Will There's a Way, 4 Fordham U.L.J. 233, 237–38 (1976).

18. See Lawrence H. Averill, Jr., Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I, 7 Land & Water L. Rev. 169, 176 (1972); Earl M. Curry, Jr., Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio, 34 Ohio St. L.J. 114, 116 (1973); Fratcher, *supra* note 10, at 1047; Mulder, *supra* note 15, at 301, 306; Daniel H. O'Connell & Richard W. Effland, Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code, 14 Ariz. L. Rev. 205, 209 (1972).

in the absence of a will conforms to the likely wishes of a person who dies without having executed a valid will, it creates a trap for the ignorant or misinformed. The alternative defensible rationale for adoption of a particular distributive pattern in an intestacy statute is that it serves society's interests.[19] There are four identifiable community aims: (1) to protect the financially dependent family;[20] (2) to avoid complicating property titles and excessive subdivision of property;[21] (3) to promote and encourage the nuclear family;[22] and (4) to encourage the accumulation of property by individuals.[23] If society's well-being requires a distributive pattern different from the determined wishes of intestate decedents, the decedents' wishes should be subordinated.[24] But our society places high value on testamentary freedom. Thus, the preferred distributive pattern of intestate decedents should be given full effect and should be deviated from only if necessary to satisfy an overriding societal interest. To do otherwise would be contrary to our concept of testamentary freedom.

The second inquiry concerning the most accurate manner for ascertaining the probable dispository wishes of intestate decedents raises further complexities. The testamentary intent of persons who die without wills[25] can only be inferred from data on two groups of individuals: (1) those who have died leaving wills and (2) living persons who express their opinions as to how they would like their property distributed at their deaths.[26] The early investigations in this area concentrated on the first group,[27] and the results of those studies, as noted, have influenced the dispository scheme of currently enacted legislation. Exclusive reliance on these surveys is troublesome.[28] Persons who die with wills

19. See 1 Ely, *supra* note 1, at 425–43; Kossow, *supra* note 17, at 238–39.

20. 1 Ely, *supra* note 1, at 431–43; 7 Powell, *supra* note 9, at ¶ 997. But cf. Sussman, *supra* note 15, at 1–3 (asserting that the importance of inheritance to the economic maintenance of the family has diminished).

21. See 1 Ely, *supra* note 1, at 431; G. D. H. Cole, Inheritance, in 8 Encyclopedia of the Social Sciences 35, 36 (1932).

22. Friedman, *supra* note 4, at 14:

> Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it....Rules favoring wives and children reinforce the nuclear family. Any radical change in the rules, if carried out, will radically change the society.

See also 1 Ely, *supra* note 1, at 431.

23. See 1 Ely, *supra* note 1, at 431–32; Cole, *supra* note 21, at 37–43.

24. See 1 Ely, *supra* note 1, at 426–27; Simes, *supra* note 1, at 21; notes 49–52 *infra* and accompanying text. See also Friedman, *supra* note 1, at 355–57.

25. See notes 72–74 *infra* and accompanying text.

26. A variation on these two groups is found in the Sussman study where the researchers interviewed the survivors of decedents to determine if they had wills and, if so, the disposition of the estates provided by them. Sussman, *supra* note 15, at 45–52.

27. See sources cited in note 15 *supra*.

28. See Kossow, *supra* note 17, at 237 n.24.

tend to be older, wealthier, and with higher occupational status and higher yearly incomes than those persons who die without wills.[29] Furthermore, testators usually determine the terms of their wills with the advice of an attorney. Much of this advice should be incorporated into the intestate succession scheme. For example, attorneys frequently caution against bequeathing property directly to a minor child, because such a bequest requires appointment of a guardian to the estate of the child,[30] which can prove costly and cumbersome. Other aspects of legal advice, however, may prove less helpful in determining an intestate decedent's wishes. Some dispository provisions found in wills are determined, at least in part, by the estate tax law. The size of the probate estates of intestate decedents typically does not warrant consideration of tax implications, and therefore such will provisions are less helpful to providing insight into the dispository wishes of intestate decedents. Other dispository provisions frequently found in wills are based more on custom within the legal profession than on good legal reasons.[31] To the extent that such provisions can be detected, they should be examined to determine whether they reflect the dispository wishes of testators or attorneys' predispositions. Thus, a survey of living persons permits insight into whether persons in different socioeconomic classes from those found in prior will studies have different dispository preferences. This kind of survey also permits detection of influences of attorneys on dispository provisions found in wills. Additional advantages to a survey of living persons are that the sample respondents can more easily be drawn from a large geographical area than they can when the source of the data is probate records[32] and that issues impossible to answer from probate records can be addressed in interviews. There are obvious limitations to such surveys. For example, time con-

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29. See Sussman, *supra* note 15, at 62–82; Glenn R. Drury, The Uniform Probate Code and Illinois Probate Practice, 6 Loy. Chi. L.J. 303, 315 (1975); Dunham, *supra* note 15, at 245 n.9, 248–51; Mary Louise Fellows, Rita J. Simon, Teal E. Snapp, & William D. Snapp, An Empirical Study of the Illinois Statutory Estate Plan, 1976 U. Ill. L.F. 717, 717 n.3 [hereinafter cited as Illinois study]; Mulder, *supra* note 15, at 307–12; Ward & Beuscher, *supra* note 15, at 411–15; Intestate Succession in New Jersey: Does It Conform to Popular Expectations? 12 Colum. J.L. & Soc. Prob. 253, 256–61, 287 (1976) [hereinafter cited as New Jersey study]; notes 65–71 *infra* and accompanying text.

30. But see UPC § 3-915, Comment, which suggests that guardianship might not be always necessary in view of the combined effect of UPC §§ 3-915 and 5-103.

31. See, e.g.:

> Mr. Zartman [a leading estate planner and probate attorney in Chicago, Illinois]...argues that his clients prefer division by families rather than per capita when descendants of the same degree inherit. This makes Illinois law, which so ordains, preferable in his view to the Code which goes the other way. In my experience, clients prefer what the lawyer suggests to be "normal" when it comes to secondary gifts to descendants.

Richard V. Wellman, A Reaction to the Chicago Commentary, 1970 U. Ill. L.F. 536, 537.

32. See notes 40–44 *infra* and accompanying text.

straints on interviews do not give respondents an opportunity for thoughtful consideration that would typically accompany a will execution. In sum, neither type of survey is independently sufficient to determine the dispository wishes of intestate decedents. But a survey of living persons can assist in validating the results of the will studies and can provide information that cannot be obtained from other sources. The authors have conducted a survey of persons residing in Alabama, California, Massachusetts, Ohio, and Texas, and compared their results with results of prior studies; their conclusions serve as the basis for proposals to amend existing intestate succession laws.

II. Method and Design

In May 1977, National Family Opinion (NFO), a marketing research organization based in Toledo, Ohio, completed 150 telephone interviews in each of five states: Alabama, California, Massachusetts, Ohio, and Texas. Respondents were drawn randomly from the respective state subfiles in NFO's national panel of 180,000 families.[33] Contacts and attempted contacts to 1,221 families produced 750 completed interviews.[34]

All respondents had previously agreed to cooperate in NFO research projects.[35] Interviewers introduced themselves as employees of NFO and explained that they were conducting a study for a major university. The study was presented as a survey of public opinion on possible improvements in state laws regarding succession, particularly those laws that determine property distribution when an individual dies without a will.

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33. NFO has two panels: an aggregate panel of slightly over 180,000 families and a 90,000-family balanced panel. The balanced panel is matched to current U.S. Census population estimates for age, income, family size, and population density for each of nine census regions. The state samples used in this survey were selected from the balanced panel.

Market researchers have found that after they have obtained a sample frame that is representative of the city, state, or country or any other geographical unit, the number of persons who do not choose to take part in any given survey is small and such refusal does not bias the responses.

34. For the five states, NFO randomly chose 1,250 families. From this sample, 1,221 attempted contacts were made yielding 750 completed interviews. NFO procedure is to call a family. If contact is not made, the caller moves on to the next name on the list. NFO does not have information on the actual rejection rate for our project, but its actual rejection rate normally runs substantially below 5 percent.

Demographic information on one of the respondents was unavailable, so the sample size used in statistical analysis was 749.

35. This is one of the reasons why NFO has such a high rate of successfully completed interviews. A pretest of the questionnaire, however, produced similar results. Only one telephone respondent out of 19 refused to complete the interview. On the pretest the authors found that respondents developed a lively interest in this research topic. Apparently, inheritance is an issue that many people consider important and interesting.

NFO maintains a current[36] demographic file on its panel. Access to this information permitted the authors to devote a majority of the interview to legal questions. The average completion time for an interview was 20 minutes.

An earlier investigation[37] conducted in Illinois (hereinafter "the Illinois study") indicates that the sex of the respondent is perhaps the most important variable in determining the patterns of property distribution. Consequently, the research design called for, and attained, equal numbers of male and female respondents in each state. To determine whether the demographic characteristics of the respondents in this survey reflected the characteristics of the population in the states from which they were drawn and the characteristics of the national population, the authors compared respondents in the NFO sample with state and national population data by age, education, family income, and occupational status of male heads of households. Table 1 compares respondent demographic characteristics on a state-by-state basis, and table 2 compares the demographic characteristics of the entire sample with national characteristics. The NFO sample is somewhat biased in that the respondents have more years of schooling and are more likely to work as professionals than the residents of their respective states. The age and income distributions between the NFO sample and the state population reveal no consistent bias. The statistics in table 2 show that on a national basis the NFO frame also underrepresents the lowest education and income categories. The differences are small, however, and the overall correspondence between the sample and the national data is sufficiently close to permit generalization with reasonable confidence not only to the populations of the five states but also to the national population.

The techniques used to determine distribution patterns were originally developed in the Illinois study. The respondents were asked how they would like their property distributed if they died without wills and were survived by certain relatives. They were told that the indicated relatives were the only survivors. For example, respondents were asked what percentage of their estates they would give to each survivor if they died without wills survived only by a spouse and a mother. Interviewers further explained to the respondents that they were to apportion their property on a percentage basis as they saw fit, not on the basis of what

36. The demographic information on the respondents was current as of April 1977.
37. Illinois study, *supra* note 29.

TABLE 1

Comparison of Survey Respondents with State Population by Demographic Characteristics (Percent)

	Alabama		*California*		*Massachusetts*		*Ohio*		*Texas*	
	Sample	State	Sample	State	Sample	State	Sample	State	Sample	State
Age:[a]	*Age Distribution of Whites 25 Years Old or Older*									
25-29	11.5	12.4	11.6	13.6	9.2	11.6	12.8	12.1	17.1	13.0
30-34	17.6	10.8	10.1	11.2	14.3	9.2	12.1	10.4	22.9	11.0
35-44	21.4	21.5	18.1	21.9	20.7	19.8	17.7	21.2	17.1	21.9
45-54	19.8	20.9	25.3	23.3	22.1	21.3	27.0	23.8	16.4	20.5
55-64	18.3	17.3	18.8	16.5	21.4	17.4	22.0	16.7	14.3	16.5
65 and over	12.2	17.1	15.9	17.7	12.1	20.5	8.5	17.8	12.1	17.1
Education:[b]	*Education of Whites 14 Years Old or Older*									
Less than high school	20.6	55.9	10.7	15.5	10.9	20.7	12.3	26.8	19.2	26.5
High school	41.3	29.3	23.5	31.0	41.1	35.5	51.4	39.4	25.3	31.1
College:										
1-3 years	17.3	8.8	36.2	37.4	17.8	29.8	15.8	22.4	25.3	28.8
4 years	20.6	8.9	29.5	16.1	30.1	14.0	20.5	11.4	30.2	13.6
Occupation:[c]	*Selected Occupations of Employed Males 14 Years Old or Older*									
White collar:										
Professional	16.7	10.4	22.1	16.8	22.3	16.6	16.0	12.5	19.6	12.9
Managerial	11.3	13.5	14.1	11.5	11.5	11.3	12.7	9.5	12.8	11.1
Sales	9.3	6.2	8.1	7.7	8.1	6.8	6.7	6.3	8.8	11.1
Clerical	3.3	5.8	4.7	7.6	3.4	8.1	5.3	6.8	7.4	6.8
Blue collar:										
Craft	19.3	21.6	12.1	18.4	20.3	19.3	17.3	21.2	17.6	20.0
Operatives	8.0	15.0	6.0	10.0	6.1	12.3	15.3	18.0	4.1	11.4
Laborers	2.0	8.4	2.7	5.8	0.7	5.1	2.0	6.1	1.4	6.6
Family income:[d]	*Income of Husband-Wife Households*									
Less than $5,000	10.0	11.6	4.7	5.6	3.4	4.0	6.0	5.4	6.8	19.9
$5,000-$9,999	22.7	22.5	15.4	17.3	14.8	15.0	17.3	16.4	23.6	25.4
$10,000-$14,999	27.3	25.2	25.5	20.2	27.7	21.8	26.7	23.8	27.0	20.8
$15,000-$19,999	17.3	17.6	17.5	19.6	23.0	21.7	20.7	24.2	19.0	14.4
$20,000-$24,999	11.3	11.6	17.4	13.7	16.2	15.7	17.3	14.5	10.8	9.0
$25,000-$29,999	8.0	5.5	6.0	9.8	6.8	9.1	8.7	7.0	7.4	4.4
$30,000 and over	3.4	6.0	13.4	13.9	8.1	12.6	3.4	8.7	5.4	6.1

[a]Population data obtained from U.S. Bureau of the Census, Census of Population: 1970, Vol. 1, Characteristics of the Population (Washington, D.C.: Government Printing Office, 1973).

[b]Population data for California, Massachusetts, Ohio, and Texas obtained from U.S. Bureau of the Census, Current Population Reports, Series P-20, No. 314, Educational Attainment in the United States: March 1977 and 1976, table 8 (Washington, D.C.: Government Printing Office, 1977). Population data for Alabama obtained from U.S. Bureau of the Census, *supra* note a, table 148. Current educational figures are not available for the Alabama population; therefore, the comparison is made to the 1970 Census. Because of the substantial transformation in educational attainment since then, the large divergence between sample and population figures for education in this state may be primarily a function of lack of current data rather than sampling bias.

[c]Population data obtained from U.S. Bureau of the Census, *supra* note a, table 170.

[d]Population data obtained from U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 108, Household Money Income in 1975 by Housing Tenure and Residence, for the United States, Regions, Divisions, and States (Spring 1976 Survey of Income and Education), table 20 (Massachusetts), table 22 (Ohio), table 25 (Alabama), table 26 (Texas), and table 28 (California) (Washington, D.C.: Government Printing Office, 1977).

TABLE 2

Comparison of Survey Respondents with U.S. Married Person Population by Demographic Characteristics (Percent)

	Sample		*National*	
	Male	Female	Male	Female
Age:				
Under 25	4.9	8.9	7.0	11.7
25–29	11.6	11.3	12.0	13.2
30–34	13.6	14.8	11.1	11.6
35–44	16.2	19.5	19.4	19.3
45–54	19.9	20.8	19.9	19.6
55–64	17.8	14.6	16.2	14.7
65 and over	16.0	9.9	14.2	9.8
Education:				
Less than 8 years	3.6	1.9	9.4	6.4
8th grade	2.9	1.5	8.8	7.0
1–3 years high school	11.1	8.6	14.7	16.0
High school graduate	29.8	41.4	34.3	45.1
1–3 years college	22.6	24.3	14.4	13.8
Bachelor's degree	22.4	19.3	10.0	8.2
Postgraduate	7.6	3.1	8.4	3.5
Occupational categories (males):				
White collar	46.2		47.9	
Blue collar	34.4		39.1	
Farm	2.6		3.6	
Services	5.5		9.4	
Other	11.3		-	
Percentage in work force	78.0		72.6	
Selected occupations of male heads of households:				
Professional, technical	19.5		17.0	
Managers	12.4		15.0	
Sales	8.1		6.4	
Clerical	6.2		10.0	
Crafts	22.1		18.8	
Laborers	12.3		20.3	
Other	19.4		12.9	
Family income:				
Less than $5,000	6.1		12.6	
$5,000–$9,999	18.8		13.5	
$10,000–$14,999	26.7		26.0	
$15,000–$19,999	19.5		19.7	
$20,000–$24,999	14.6		13.8	
$25,000 and over	14.3		14.4	

National data obtained from the following Current Population Reports, U.S. Bureau of the Census (Washington, D.C.: Government Printing Office, 1977): *for age,* Series P-20, No. 306, Marital Status and Living Arrangements: March 1976, table 1; *for occupation,* Series P-20, No. 311, Household and Family Characteristics: March 1976, table 20; *for education,* Series P-20, No. 314, Educational Attainment in the United States: March 1977 and 1976, table 4; *for income,* Series P-60, No. 109, Household Money Income in 1976 and Selected Social and Economic Characteristics of Households, table 13.

they thought the intestate law to be or even what they thought the law should be. Table 3 lists the 11 sets of hypothesized survivors presented to the respondents.

TABLE 3

Hypothesized Sets of Survivors

Set		Set	
1.	Spouse Mother	7.	Spouse Minor child by, and living with, former spouse
2.	Spouse Minor son Minor daughter	8.	Minor child, present marriage Minor child, prior marriage and living with former spouse
3.	Spouse Minor child Adult child	9.	Living son Living son's child Deceased son's child
4.	Father Brother Sister	10.	First son's child 1 First son's child 2 Second son's child
5.	Child Illegitimate child	11.	Living son First deceased son's child 1 First deceased son's child 2 Second deceased son's child
6.	Father Mother Brother Sister		

To determine relationships between property ownership and distribution preferences, respondents were also asked to describe their property holdings. Respondents were asked to estimate the values of their present estates.[38] If a respondent was unable or unwilling to provide this information, the interviewers probed for an estimate through the following question:

> Would it fall into the $0 to $5,000 range, the $6,000 to $12,000 range, the $13,000 to $25,000 range, the $26,000 to $49,000 range, or $50,000 and above?

Each respondent was also asked if he owned any of the following types of assets: automobile, bonds, stocks, house, other real estate, savings

38. To eliminate complicated discussions in the interview, the respondents were not asked to differentiate between probate estate property and other property such as life insurance, pension benefits, or joint tenancy property. Some respondents may have included some or all of these non-probate assets in their estimates and others may not have. The estimates obtained appear valuable despite this problem because the authors were most interested in the relative perceived wealth of the respondents.

account. If he answered affirmatively, he was asked whether the title to the asset was in the husband, wife, or both.[39]

To further assist the understanding of the nature of the relationship between wealth and distribution preferences, respondents were asked to assume they owned estates that were greater or smaller than their actual estates and to reconsider most of the hypothetical situations in table 3. Based on the estimates of respondents' actual estate sizes, respondents were placed in one of the three following groups:

Small Estate Group	$0-$12,000
Medium Estate Group..	$13,000-$49,000
Large Estate Group	$50,000 and over

Respondents in each of these three actual estate groups were then divided further into two subgroups. One-half of the respondents in the Small Estate Group were asked to assume a hypothetical estate of $20,000, and the other half, to assume an estate of $100,000. One-half of the respondents in the Medium Estate Group were asked to assume an estate valued at $6,000, and the other half, to assume an estate of $100,000. One-half of the respondents in the Large Estate Group were asked to assume an estate of $20,000, and the other half, to assume an estate of $6,000. While this design is not flawless, it should help to separate the effects of financial factors from psychological and cultural factors.

The respondents were asked a final group of questions concerning attitudes toward intestate succession laws and freedom of testation to help identify economic, cultural, and sociological factors that may assist evaluation of existing intestate succession laws. Respondents were asked:

> Do you have a will?
>
> [If no] What are your reasons for not having a will?
>
> If you died today without a will, do you know who would inherit your property?
>
> [If yes] Could you tell me who would receive what proportions of your property if you were survived by your [wife/husband], two minor children, and your mother and father, supposing you have all these family members, and they are all living?

Responses to these questions aid in identifying persons who rely on intestate succession statutes and in determining the public's knowledge of those statutes. To identify how strongly people feel about the right of

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39. The respondents were not asked to differentiate among joint tenancies with right of survivorship, tenancies by the entirety, tenancies in common, or community property because these legal distinctions are not likely to be recognized by laypersons.

an individual to determine who shall share in his estate at death, respondents were asked whether the law should limit inheritance either to relatives, to friends of long standing, or to organizations to which an individual has had a long connection. Respondents were further asked to give reasons for their answers to this question. To test the strength of opinion for those who felt that no restrictions should be imposed by the law, the respondents were asked whether an individual should have the right to give most of his estate to the care and maintenance of his dog or cat. Again, they were asked to explain their answers to that question.

III. Previous Will Studies—Method and Design

There have been four major U.S. will studies that investigated the patterns of distribution chosen by testators. In 1950 Edward Ward and J. H. Beuscher published their study of a random sample of 415 probate proceedings in Dane County, Wisconsin, for persons who died in 1929, 1934, 1939, 1941, and 1944.[40] In Allison Dunham's investigation of probate proceedings initiated in Cook County, Illinois, in 1953 and in 1957,[41] 97 estates were selected randomly from all estates opened in Cook County in 1953, and 73 estates were selected from death certificates issued by the city of Chicago in 1957. Olin Browder studied the records of decedent estate administration in Washtenaw County, Michigan, and similar records in London, England.[42] For Washtenaw County, 233 estates, all the estates opened in the county in 1963, were examined. Data concerning English practices were derived from 100 English wills selected at random from those filed during 1963 in the Principal Probate Registry in London. These wills came from all over England and Wales and thus represent English practice generally. Marvin Sussman, assisted by Judith Cates and David Smith, studied 659 decedent estates chosen randomly from estates closed in Cuyahoga County, Ohio, Probate Court between November 1964 and August 1965.[43] Sussman also conducted interviews of the beneficiaries provided for in the wills and of all those persons eligible to inherit from the decedent under the Ohio intestate succession statute to ascertain the extent of the survivors' satisfaction with the final disposition of the decedent's estate and to determine the dispository wishes of the survivors.[44]

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40. Ward & Beuscher, *supra* note 15.
41. Dunham, *supra* note 15.
42. Olin L. Browder, Jr., Recent Patterns of Testate Succession in the United States and England, 67 Mich. L. Rev. 1303 (1969).
43. Sussman, *supra* note 15.
44. See note 26 *supra*.

Reference will also be made to a less well known but more recent study conducted by Columbia law students and published in 1976 in the *Columbia Journal of Law and Social Problems.*[45] This study reviewed 53 wills drawn randomly from the Morris County, New Jersey, Surrogate's records in 1971. In addition, 100 randomly selected estates of Morris County residents who died in Morristown during 1971 were studied to permit inquiry into demographic characteristics of those persons who die intestate. Finally, two telephone surveys based on random samples drawn from the Morris Area telephone directory were conducted. The first asked questions of respondents to ascertain their understanding of the procedure for transfer of property owned by an intestate decedent. The second asked questions designed to determine the public's distribution preferences in a manner similar to the survey conducted by the present authors.

IV. Findings

A. Testamentary Freedom

An underlying premise of this study is that people have the right to determine the successors to their accumulated wealth. Although the right of succession is not constitutionally protected,[46] the right has gained general acceptance in Anglo-American law during the past two centuries.[47] Curtailment of testamentary freedom has been unpopular largely because of a belief that beneficial economic and social effects result from a policy of allowing nearly unrestricted transfers of wealth at death. The accumulation of property and control of its transfer at death is thought to breed ingenuity, initiative, creativity, and self-reliance.[48]

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45. New Jersey study, *supra* note 29.

46. The federal Constitution does not forbid a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942). See Page, *supra* note 1, § 3.1.

The Wisconsin Supreme Court, however, sharply dissents from this view. It held that under the federal and Wisconsin constitutions "the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the legislature." Nunnemacher v. State, 129 Wis. 190, 202-3, 108 N.W. 627, 630 (1906).

47. See Thomas E. Atkinson, Handbook of the Law of Wills § 5 (2d ed. St. Paul: West Publishing Co., 1953); 1 Ely, *supra* note 1, at 415-20; Page, *supra* note 1, § 1.7, at 27-28; E. Adamson Hoebel, The Anthropology of Inheritance, in Social Meaning of Legal Concepts No. 1. Inheritance of Property and the Power of Testamentary Disposition 5-26 (Edmond N. Cahn ed. 1948).

48. See Atkinson, *supra* note 47, § 5, at 34-35; 2 F. W. Taussig, Principles of Economics 288-309, 564-66 (4th ed. New York: Macmillan Co., 1939); 6 American Law of Property § 26.1, at 409, and § 26.3 (A. James Casner ed. Boston: Little, Brown & Co., 1952); Calvin Coolidge, The Harmful Economic Effects of Existing Estate Taxation in the United States, 29 Econ. World 305 (1925); A. W. Mellon, Economic Aspects of Estate and Inheritance Taxation, 39 Tr. Companies 708-10 (1924); Jerome Nathanson, The Ethics of Inheritance, in Social Meaning of Legal Concepts, *supra* note 47, at 74.

To allow absolute testamentary freedom, however, would leave the nuclear family unprotected[49] and permit owners to place great fortunes in the hands of individuals who have not demonstrated their ability to handle the power of wealth[50] or to place large amounts of wealth in trusts for the benefit of successive generations and thereby limit the availability of the property for consumption or risk investments.[51] More important, perhaps, is that unrestricted testation for the purpose of creating incentive and ingenuity in the owner may destroy the incentive and self-respect of the recipients.[52] Our society recognizes these dangers of testamentary freedom, and various types of limitations on testamentary freedom have been written into the law to guard against dispositions that discourage rather than encourage economic and social developments. Surviving spouse protection statutes[53] and pretermitted heir statutes[54] can be found in almost every state. Some jurisdictions have enacted statutes restricting gifts to charity to help insure the financial security for the nuclear family.[55] If a testator provides for a distribution that excludes the spouse and children, the court will more carefully scrutinize the events surrounding execution of the will so as to find evidence of lack of testamentary capacity or undue influence. In short, wills that do not provide for a "natural" distribution are disfavored.[56] Indirect restraints on property alienation have been limited

49. See Atkinson, *supra* note 47, § 5, at 34; Sussman, *supra* note 15, at 4; Friedman, *supra* note 1, at 375–76.

50. See Atkinson, *supra* note 47, § 5, at 34; Edward C. Halbach, Jr., An Introduction to Chapters 1–4, in Death, Taxes and Family Property, *supra* note 4, at 3, 4.

51. See Friedman, *supra* note 1, at 355–56.

52. See Simes, *supra* note 1, at 58–59; 6 American Law of Property, *supra* note 48, § 26.2, at 411; Friedman, *supra* note 1, at 356, for discussions of these competing considerations with respect to the Rule Against Perpetuities.

53. See Atkinson, *supra* note 47, § 30, at 100; 7 Powell, *supra* note 9, ¶ 970; Lowell Turrentine, Cases and Text on Wills and Administration 17–26 (2d ed. St. Paul: West Publishing Co., 1962). Besides personal property exemptions, homesteads, and family allowances, most states have a "forced share" statute, which allows the surviving spouse to renounce the will and elect the statutory "forced share." For criticism of the elective share of the surviving spouse, see Verner F. Chaffin, A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession, 10 Ga. L. Rev. 447 (1976); Sheldon J. Plager, The Spouse's Nonbarrable Share: A Solution in Search of a Problem, 33 U. Chi. L. Rev. 681 (1966).

54. See Atkinson, *supra* note 47, § 36, at 141–45. Pretermitted heir statutes protect children from unintended disinheritance by providing that unless the testator indicates an intention to disinherit a child in his will, the child is entitled to receive the portion of the estate he would have received had the testator died intestate. All pretermitted heir statutes apply to children born to the testator after the will was executed; about half of these statutes also apply to children who were living when the will was executed.

55. See Atkinson, *supra* note 47, § 35; Page, *supra* note 1, §§ 3.15–3.19; 7 Powell, *supra* note 9, ¶ 969; Friedman, *supra* note 1, at 359.

56. See Ga. Code § 113-106 (1975) (quoted in note 3 *supra*); Atkinson, *supra* note 47, § 36, at 139 & n.5, 140 & nn. 6 & 9; Page, *supra* note 1, § 3.11, at 91 & n.6, 92 & n.8; Edwin M. Epstein, Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform, 35 Temp. L.Q. 231 (1962); Friedman, *supra* note 1, at 358–59.

by the Rule against Perpetuities[57] and by statutes that limit the duration of restrictions on the use of property.[58] Additionally, provisions that condition the gift to beneficiaries on the performance of certain acts are subject to a court determination of whether such conditions are contrary to public policy.[59] For example, if a testator bequeaths $100,000 to his son on condition that he divorce his wife, the courts will find the conditions void as against public policy and permit the son to take the $100,000 gift free of any condition.[60] In addition to the foregoing property rules limiting testamentary freedom, federal income and wealth transfer taxes as well as state taxes have been enacted, in part, to curb the accumulation of large amounts of wealth in one family.[61] Such restrictions on testamentary freedom are significant but are not generally considered too harsh. The legislatures and courts are aware of the complexities of economic and social incentives involved here and try to maximize the benefits of testamentary freedom while minimizing its costs.[62]

To obtain some insight into the public's attitude toward testamentary freedom and restrictions on the transmission of property at death, respondents were asked the following questions:

1. Should the law limit inheritance to either relatives, to friends of long standing, or to organizations to which an individual has had a long time connection or should there be *no* restrictions at all on the way a person distributes his property?
2. Why do you feel that way?
3. Do you think that an individual should have the right to give most of his estate to the care and maintenance of his dog or cat for as long as that animal shall live?
4. Why do you feel that way?

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57. See Gray, *supra* note 2; J. H. C. Morris & W. Barton Leach, The Rule Against Perpetuities (2d ed. London: Stevens & Sons, 1962); Page, *supra* note 1, §§ 42.8-.12; Simes, *supra* note 1, at 32-82; 3 Lewis Simes & Allan F. Smith, The Law of Future Interests §§ 1211-1390 (2d ed. St. Paul: West Publishing Co., 1956); 6 American Law of Property, *supra* note 48, §§ 24.1-25.118.

58. See Simes & Smith, *supra* note 57, § 1994.

59. See 6 American Law of Property, *supra* note 48, §§ 27.1-.23; Note, Conditional Bequests and Devises, 42 B.U.L. Rev. 520, 535-36 (1962).

60. *In re* Estate of Gerbing, 61 Ill. 2d 503, 337 N.E.2d 29 (1975); *In re* Onora's Will, 205 Misc. 531, 130 N.Y.S.2d 480 (Sur. Ct. 1954); Dwyer v. Kuchler, 116 N.J. Eq. 426, 174 A. 154 (1934); *In re* Haight's Will, 51 App. Div. 310, 64 N.Y.S. 1029 (1900); Graves v. First Nat'l Bank, 138 N.W.2d 584 (N.D. 1965). See 6 American Law of Property, *supra* note 48, § 27.18, at 664-65; Restatement of Property § 427 (1944).

61. Atkinson, *supra* note 47, § 5, at 31; Page, *supra* note 1, § 1.7, at 29; Simes, *supra* note 1, at 56-57; Edmond N. Cahn, Federal Regulation of Inheritance, 88 U. Pa. L. Rev. 297 (1940); Friedman, *supra* note 1, at 351; Gerald R. Jatscher, The Aims of Death Taxation, in Death, Taxes and Family Property, *supra* note 4, at 40, 51-55.

62. See, e.g., Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); N.Y. Est., Powers & Trusts Law § 5-1.1 (McKinney 1967 & Cum. Supp. 1977-78). See also Atkinson, *supra* note 47, § 32, at 113-17; Simes, *supra* note 1, at 30; Curry, *supra* note 18, at 134.

When respondents were asked the general question concerning freedom of testamentary disposition, 89 percent thought there should be no restrictions. When asked to explain, the respondents merely repeated their beliefs that a person should not be restricted in choosing a distributive plan. When asked whether an individual should have the right to leave property to the care and maintenance of an animal, 54 percent did not think an individual should be permitted to dispose of property in this manner at death. (Interestingly, the law gives effect to these dispositions.[63]) When asked to explain their answers in the fourth question, those respondents who did not agree with this disposition were troubled about those who choose to care for animals rather than people. Those who would permit the disposition merely repeated their conviction that the law should not restrict testamentary dispositions in any manner. When responses to questions 1 and 3 were combined, it was found that 43 percent would place no restrictions on testamentary transfers; 49 percent would restrict the dispositions to animals; and 8 percent would restrict dispositions generally.

These findings highlight the delicate balance that the courts and legislatures must maintain. Even though the presumption in favor of testamentary freedom corresponds to public attitudes, many agree that some limitations are necessary. The unresolved and perhaps unresolvable issue concerns the specific types of restrictions that should be imposed. The public's attitude toward testamentary freedom, as revealed in the present investigation, emphasizes the importance of determining the distributive preferences of intestate decedents and the desirability of giving maximum effect to those preferences.

B. Frequency of Testacy

To predict the probable dispository preferences of people who die without wills, identification of the demographic characteristics of such people can be helpful. Substantial data pertaining to this issue are available. Prior will studies have isolated demographic characteristics of testate decedents. Those studies show that wealth, age, and occupation are directly related to the frequency of testacy.[64] Imminence of death accounts for the differences in testacy between the young and the old. In addition to age, the accumulation of wealth, especially among middle-aged persons, presumably creates the compelling need to execute a will.

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63. See 2 Austin Wakeman Scott, The Law of Trusts § 124.3 (3d ed. Boston: Little, Brown & Co., 1967 & Supp. 1977); Barbara W. Schwartz, Estate Planning for Animals, 113 Trusts & Ests. 376 (1974).

64. For an excellent analysis of findings of prior will studies, see Mulder, *supra* note 15, at 307-12.

Over 45 percent of the respondents interviewed in this study had a will.[65] Table 4 describes the demographic characteristics that were found to be significant.[66]

These findings are consistent with prior will studies. Education was not isolated as a predictive factor in prior studies but was probably reflected in the occupational status variable. Similarly, although the family status factor was not previously identified, it was probably reflected in the age factor. When the findings are considered in conjunction with family protection statutes found in most states, such as homestead protections,[67] personal property exemptions,[68] and family allowances, which provide support to the decedent's family during the estate administration period,[69] it is apparent that the intestate succession statutes have their greatest effect on persons with moderate-sized estates.[70]

Each of the earlier studies was carried out in a single jurisdiction,

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65. This proportion of living persons with wills is high compared to findings obtained in some prior studies. See Dunham, *supra* note 15, at 245 n.9; Illinois study, *supra* note 29, at 718 n.3. But see Sussman, *supra* note 15, at 68–69 (58 percent of the survivor population were testate).

66. The significance of the relationship between these demographic characteristics and testacy is as follows:

Demographic Characteristics	χ^2	*df*	Probability
Family income	36.2	4	.0000
Education	24.8	4	.0000
Occupational status	14.3	2	.0008
Age	161.5	5	.0000
Family status	79.6	2	.0000
Estate size	96.8	4	.0000
State of residence	20.1	4	.0005

A few general comments on the chi square (χ^2) test of significance may be helpful to the reader. The χ^2 test differentiates between real and chance differences and is a statistic that measures the discrepancy between observed and expected frequencies. If the observed frequencies agreed completely with the expected, χ^2 would be zero. The χ^2 increases in size as the observed frequencies depart more and more from the expected frequencies. The question is how large does the difference between the observed and expected frequencies have to be before it is considered a real difference. The question is answered in terms of probability theory; a difference is considered statistically significant if the probability of its occurring by chance is less than 5 in 100 ($p < .05$). The smaller the probability (p) value, the larger the difference. When the p value is greater than .05 we can assume either that there are no differences or that the differences are due to chance; i.e., they are negligible. The degrees of freedom (df) is a criterion used to determine the probability of the frequency of χ^2. Thus for the table shown above, we have established that each demographic characteristic (i.e., family income, age, etc.) is significantly related to testacy because in each instance the probability of such relationship not occurring is at least 8 in 10,000.

67. See, e.g., UPC § 2-401.

68. See, e.g., UPC § 2-402.

69. See, e.g., UPC § 2-403.

70. The total value of these family protection provisions typically exceeds $10,000 in most states. See, e.g., Alaska Stat. §§ 13.11.070, .125, .130, .135, .140 (1972); Colo. Rev. Stat. §§ 15-11-201 to -202, -402 to -404, 38-41-204 to -205, -208, -211 (1973); Fla. Stat. Ann. §§ 732.201, .207, .401, .403 (West 1976), § 732.402 (West Cum. Supp. 1978); Haw. Rev. Stat. §§ 560:2-201, -401 to -404 (1976); Ill. Rev. Stat. ch. 52, §§ 1, 2, ch. 110½, §§ 2-8, 15-1 to -2 (1977); Wis. Stat. Ann. §§ 852.09, 861.41 (West 1971), §§ 861.05, .31, .33, .35 (West Cum. Supp. 1977–78).

TABLE 4

Demographic Characteristics of Respondents Who Do and Do Not Have Wills

	Have Will	No Will	*N*
Family income:			
Under $8,000	38.8	61.2	134
$8,000–$13,999	33.5	66.5	215
$14,000–$19,999	47.0	53.0	183
$20,000–24,999	55.0	45.0	109
$25,000 and over	65.4	34.6	107
Education:			
Less than high school diploma	36.7	63.3	109
High school diploma	43.9	56.1	269
College less than bachelor's degree	42.8	57.2	166
Bachelor's degree	53.3	46.7	152
Advanced degree	60.0	40.0	40
Occupational status:			
Nonlabor	51.2	48.8	301
Blue collar	30.4	69.6	112
White collar	45.4	54.6	335
Age:			
17–24	7.8	92.2	51
25–30	14.4	85.6	111
31–45	34.6	65.4	228
46–54	60.7	39.3	140
55–64	63.4	36.6	131
65 and over	84.6	15.4	78
Family status:[a]			
No children	10.9	89.1	55
Some minor children	32.2	67.8	401
All adult children	72.6	27.4	259
Estate size:			
$0–$12,999	14.7	85.3	75
$13,000–$24,999	23.6	76.4	110
$25,000–$49,999	38.8	61.2	129
$50,000–$99,999	50.2	49.8	249
$100,000–$500,000	69.0	31.0	184
State of residence:			
Alabama	42.0	58.0	150
California	42.6	57.4	148
Massachusetts	36.5	63.5	148
Ohio	60.7	39.3	150
Texas	45.3	54.7	148

[a]NFO does not provide data on adult married children living away from home. Thus, some respondents who are parents were indicated as having no children in the NFO demographic data. To distinguish those respondents who in fact did not have children from those who have all adult married children living away from home, the following assumptions were made: (1) respondents with no children were those who according to NFO data had no children and were married 19 years or less; (2) respondents with all adult children were those who according to NFO data had no children and were married 20 years or more or who according to NFO data only had children age 18 or over. These assumptions are likely to underestimate slightly the number of respondents with no children and to overestimate slightly the number of respondents with all adult children.

which did not allow for any tests of whether state of residency was a predictive factor. The present investigation found, however, that for no reason apparent to the authors, more persons are testate in Ohio than in the other four states studied. The sample population of respondents from Ohio was similar to those of the other four states in age, income, and occupational status. Further, nothing about the Ohio law with respect to valid will executions explains the high percentage of testate respondents. Interestingly, the Sussman study in Cuyahoga County, Ohio, also found a high percentage of testate survivors.[71]

C. Knowledge of Intestacy Law

The degree of understanding citizens have of a state's intestate succession statute is a critical factor to this study and to prior will studies. If many people elect to die intestate because they know and agree with the dispository pattern found in the applicable intestate succession statute, then two important conclusions follow: (1) Some of those persons who die intestate are following their dispository preferences, and this group should not be ignored when evaluating a state's intestacy statute.[72] (2) If a substantial number of citizens are relying on the existing dispository provisions provided in the intestacy statute, legislators should be reluctant to amend these statutes.

To determine whether people who do not have wills are satisfied with the existing intestacy statute in their state, respondents who did not have wills were asked: "What are your reasons for not having a will?" Of the 385 respondents who did not have a will and answered this question, 245, or 63.6 percent, cited laziness as the primary reason. About 15 percent said they had never thought about it before the interview. Another 15 percent said they did not have a will because they did not need one either because they were young and childless or because they had little property. *No* respondents indicated that they thought the intestacy statute of their states provided a satisfactory disposition.

Further evidence that people who die intestate do not know how their property will be distributed and do not rely on existing statutes was obtained from the following two questions:

1. If you died today without a will, do you know who would inherit your property?

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71. Sussman, *supra* note 15, at 63–64.

72. Some commentators have made this assumption. See, e.g., Browder, *supra* note 42, at 1313. Others have considered and rejected the assumption. See, *e.g.*, Friedman, *supra* note 1, at 355; J. D. B. Mitchell, Reports of Committees, 14 Mod. L. Rev. 475, 480 (1951); Wellman & Gordon, *supra* note 10, at 363.

2. [If yes] Could you tell me who would receive what proportions of your property if you were survived by your [wife/husband], two minor children, and your mother and father, supposing you have all these family members and they are all living?

Over 70 percent of the respondents indicated they knew who would inherit their estates if they died without wills. But when asked in the succeeding question to name the heirs and the proportion of the estate received by each heir, only 44.6 percent responded correctly or nearly so.[73] These findings are consistent with prior studies[74] and clearly demonstrate that most citizens do not know who will inherit their property and are not relying on existing intestacy statutes.

D. Dispositive Preferences

The results of the responses to the hypothetical relation sets posed to the respondents are presented below. The first section describes the distribution of an intestate estate provided in the intestacy statutes when only members of the family of orientation[75] survive the decedent and compares these patterns to the respondents' distributive preferences. The second section makes the same comparison assuming members of the family of orientation as well as members of the family of procreation[76] survive. This discussion focuses on the decedent's spouse and how large a share of the estate the surviving spouse should receive. The third section makes the same comparison assuming only members of the family of procreation survive. Here again the surviving spouse is the focus of the discussion, which weighs the interests of the decedent's children and of the surviving spouse to determine the appropriate share of the estate to go to the spouse. Finally, in the fourth section the discussion focuses exclusively on the decedent's descendants. Distributive patterns concerning children and grandchildren provided in the intestacy laws are compared to the dispository preferences expressed by the respondents.

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73. To determine the correct number of total responses, the responses were analyzed by state and compared to the intestacy statute of each of these states. The intestacy statutes in these states, however, are quite complex. For example, under the Alabama intestacy statute, the spouse does not receive any realty but does receive 33 percent of the personalty. The spouse does have the right to elect curtesy or dower. The dower and the personalty share is subject to reduction to the extent of separate property owned by the widow. No respondent residing in Alabama appeared to be aware of these or other subtleties in the statute. The 44.6 percent figure was determined by making assumptions most favorable to the accuracy of the respondents' answers. E.g., in Alabama, a correct answer included: (1) spouse = 33 percent and minor children = 33 percent each, and (2) spouse = 0 and minor children = 50 percent each. Thus the determined percentage of respondents giving accurate responses is probably a substantial overstatement of the respondents' actual knowledge of the intestacy laws.

74. Illinois study, *supra* note 29, at 723; New Jersey study, *supra* note 29, at 266.

75. The family of orientation is the family into which the decedent is born.

76. The family of procreation is the family that the decedent establishes through marriage.

1. Distribution Between Parents and Siblings

When a person dies without a will and is survived by neither spouse nor issue, predicting who will be the natural objects of the intestate's estate is difficult, leading to uncertainty as to the appropriate intestate succession pattern.

If a decedent dies young, unmarried, and childless, any accumulated wealth is unlikely to have been earned but instead is likely to have come almost exclusively from parents or grandparents.[77] Therefore, if the individual dies before there has been time to enjoy these gifts, fairness would seem to require that the property be returned to these ancestors or, if they predeceased the young decedent, to the heirs of these ancestors. Even if the decedent's wealth were not derived from ancestors, the young decedent may feel a responsibility to repay parents for support provided during youth. If a person dies at an older age, parents (and grandparents, if still living) will be elderly and, therefore, may be economically dependent upon the decedent.[78] Distribution patterns found in intestacy statutes seem to reflect some or all of these assumptions.

Except for California and Louisiana,[79] no intestacy statute allows grandparents to share in the estate if the decedent is survived by parents or siblings. This pattern is based in part on a historical tradition disfavoring inheritance by ancestors.[80] There are also practical reasons for disfavoring ancestors. Because grandparents are likely to die relatively soon after the decedent-grandchild and thus have very little time to enjoy the property, distribution to them subjects the property to probate and death taxes twice within a short time.[81] Even if a decedent's estate were derived from the grandparent, legislatures apparently assume that most grandparents would prefer that the property be distributed to the

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77. See Mulder, *supra* note 15, at 313; Wellman & Gordon, *supra* note 10, at 364.

78. See Verner F. Chaffin, Inheritance by Ancestors and Collaterals in Alabama, 6 Ala. L. Rev. 1, 5 (1953); Wellman & Gordon, *supra* note 10, at 365; New Intestacy Rules—II, 96 Sol. J. 738, 739 (1952).

79. Cal. Prob. Code § 229(b) (West Cum. Supp. 1978) (see note 82 *infra*); La. Civ. Code Ann. arts. 908, 909 (West 1952) (see text at note 92 *infra*).

80. Under the English common law, lineal ancestors had no right of inheritance. The reason for this is unclear. See 3 W. S. Holdsworth, A History of English Law 175–77 (3d ed. Boston: Little, Brown & Co., 1923); 2 Frederick Pollock & Frederick William Maitland, The History of English Law Before the Time of Edward I, at 286–95 (2d ed. Cambridge: At the University Press, 1905); 7 Powell, *supra* note 9, ¶ 997, at 658; W. D. Rollison, Principles of the Law of Succession to Intestate Property, 11 Notre Dame Law. 14, 38–39 (1935).

81. Cf. Kossow, *supra* note 17, at 242 n.36; Wellman & Gordon, *supra* note 10, at 365 (same reasoning applied to deny inheritance by decedent's parents). Moreover, on the grandparents' deaths, the unexpended inheritance would then be shared by the intestate's uncles, aunts, and cousins, with perhaps only a small part going to the intestate's brothers and sisters. Thomas E. Atkinson, Succession Among Collaterals, 20 Iowa L. Rev. 185, 189 (1935).

parent or the parent's other issue so as to avoid the double probate costs and death taxes. In those rare cases when a grandparent is financially dependent upon a grandchild, legislatures apparently assume the decedent-granchild will make special provisions in a testamentary instrument rather than rely on the intestacy statute.

As between parents and siblings, most U.S. jurisdictions allow the parents, if both survive the decedent, to share equally in the estate and in preference to siblings.[82] A minority of states provide that each parent and each sibling share equally in the estate of the decedent.[83] Louisiana provides that each parent receive 25 percent of the estate and that the siblings share equally in the remaining 50 percent of the estate.[84] If only

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82. Ala. Code §§ 43-3-1(2), -10 (1975); Alaska Stat. § 13.11.015(2) (1972); Ariz. Rev. Stat. § 14-2103(A)(2) (Cum. Supp. 1977-78); Ark. Stat. Ann. § 61-149(c) (1971); Cal. Prob. Code § 225 (West 1956) (Special provisions concern property acquired from previously deceased spouse, *id.* §§ 228, 229(b) (West Cum. Supp. 1978); that portion of the estate created by gift, descent, or bequest from the separate property of a parent or grandparent shall go to the parent or grandparent who made such gift, devise, or bequest or from whom the property descended, but if dead, such property shall go to the heirs of such deceased parent or grandparent, *id.* § 229(b).); Colo. Rev. Stat. § 15-11-103(1)(b) (1973); Conn. Gen. Stat. Ann. § 45-276 (West 1960); Del. Code tit. 12, § 503(2) (Cum. Supp. 1977); D.C. Code § 19-308 (1973); Fla. Stat. Ann. § 732.103(2) (1976); Haw. Rev. Stat. § 560:2-103(2) (Supp. 1977); Idaho Code § 15-2-103(b) (Cum. Supp. 1977); Iowa Code Ann. § 633.219(2) (West 1964); Kan. Stat. § 59-507 (1976); Ky. Rev. Stat. §§ 391.010(2), 030(1) (Cum. Supp. 1976); Me. Rev. Stat tit. 18, §§ 851,1001(3) (1964); Md. Est. & Trusts Code Ann. § 3-104(b) (1974); Mass. Ann. Laws ch. 190, §§ 2, 3(2) (Michie/Law. Co-op 1969); Mich. Comp. Laws Ann. § 702.80 (Cum. Supp. 1978-79), § 702.93(4)-(5) (1968); Minn. Stat. Ann. § 525.16(4)(c) (West 1975); 1974 Mont. Laws ch. 365, § 1, at 1387 (to be codified as Mont. Rev. Codes Ann. § 91A-2-103(2)); Neb. Rev. Stat. § 30-2303(2) (1975); Nev. Rev. Stat. § 134.050(3) (1973); N.H. Rev. Stat. Ann. § 561:1(II)(b) (1974); N.J. Rev. Stat. § 3A:2A-35(b) (Cum. Supp. 1978-79) (effective Aug. 29, 1979); N.M. Stat. Ann. § 32A-2-103(B) Supp. 1976-77) N.Y. Est., Powers & Trusts Law § 4-1.1(a)(3) (McKinney 1967); N.C. Gen. Stat. § 29-15(3) (1976); N.D. Cent. Code § 30.1-04-03-20 (1976); Ohio Rev. Code Ann. § 2105.06(E) (Page 1976); Okla. Stat. tit. 84, § 213 (Second) (1971). (There are two exceptions to this general rule: (1) In all cases where the property is acquired by the joint industry of the husband and wife during coverture, and there is no issue, the whole of such estate shall go to the surviving spouse. At the death of the surviving spouse, if any of this property remains, one-half of such property shall go to the heirs of the husband and one-half to the heirs of the wife, according to the right of representation, *id.* (2) If the parents of a decedent who dies a minor are not living together at the time of the decedent's death, the parent having had care of the decedent shall receive the entire estate, *id.* § 213 (Third)); Or. Rev. Stat. § 112.045(2) (1977); Decedents, Estates and Fiduciaries, Pub. Act No. 23, § 1, 1978 Purdon's Pa. Legis. Serv. 33 (West) (to be codified as 20 Pa. Cons. Stat. Ann. § 2103(2) (Purdon)); R.I. Gen. Law §§ 33-1-1 (Second), -10 (Third) (1969); S.D. Compiled Laws Ann. § 29-1-6 (1976); Tenn. Code Ann. § 31-204(2) (Supp. 1977); Tex. Prob. Code Ann. § 38(a)(2) (Vernon 1956); Utah Uniform Prob. Code § 75-2-103(1)(b) (1977); Vt. Stat. Ann. tit. 14, § 551(3) (1974); Va. Code § 64.1-1 (Third) (Cum. Supp. 1977), § 64.1-11 (1973); Wash. Rev. Code Ann. § 11.04.015(2)(b) (Cum. Supp. 1978); W. Va. Code §§ 42-1-1(c), -2-1 (1966); Wis. Stat. Ann. § 852.01(1)(c) (West 1971).

83. Ga. Code § 113-903(5)-(6) (1975); Ill. Rev. Stat. ch. 110½, § 2-1(d) (1977); Ind. Code § 29-1-2-1(c)(3) (1976) (parents inherit equally with brothers and sisters, but the share shall not be less than one-quarter of the net estate); Miss. Code Ann. §§ 91-1-3, -11 (1972); Mo. Ann. Stat. § 474.010(2)(b) (Vernon 1956); S.C. Code § 21-3-20(2), (7)-(8) (1976); Wyo. Stat. § 2-3-101(c)(ii) (1977).

84. La. Civ. Code Ann. art. 903 (West 1952).

one parent survives the decedent, the majority of the states permit that parent to inherit the entire estate.[85] The remaining jurisdictions provide for one of the following patterns of succession when the decedent is survived by only one parent:

1. The surviving parent and siblings share equally in the estate.[86]
2. The surviving parent receives a share that is double that of the share going to each sibling.[87]
3. The surviving parent receives one-half of the estate and the siblings share equally in the remaining one-half of the estate.[88]
4. The surviving parent receives one-quarter of the estate and the siblings share equally in the remaining three-quarters of the estate.[89]

In addition to the above dispository patterns generally applicable to all decedents, some states make special provisions for property received from ancestors through inter vivos gifts or succession. Statutes of this kind frequently provide that if a minor dies unmarried and owning property inherited or devised to the decedent by a parent, the other children of that parent or their issue shall inherit such property from the decedent.[90] A Kentucky statute provides that if a person, regardless of age or marital status, dies without issue owning real property received by inter vivos gift from a parent and does not otherwise dispose of the property by will, that property shall be returned to the

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85. Except for Alabama, Maine, and Texas (see note 88 *infra*), all states that exclude siblings when both parents survive continue to exclude siblings when only one parent survives. See statutory citations in note 82 *supra* and Mass. Ann. Laws ch. 190, § 3(3)–(4) (Michie/Law. Co-op 1969); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(4) (McKinney 1967).

86. Ga. Code Ann. § 113-903(5)–(6) (1975); Ind. Code Ann. § 29-1-2-1(c)(3) (1976) (parent inherits equally with brothers and sisters, but the share of the parent shall not be less than one-quarter of the net estate); Miss. Code Ann. §§ 91-1-3, -11 (1972); Mo. Ann. Stat. § 474.010(2)(b) (Vernon 1956); S.C. Code § 21-3-20(2), (7)–(8) (1976); Wyo. Stat. § 2-3-101(c)(ii) (1977).

87. Ill. Rev. Stat. ch. 110½, § 2-1(d) (1977).

88. Ala. Code §§ 43-3-1(3), -10 (1975); Me. Rev. Stat. tit. 18, §§ 851, 1001(4) (1964); Tex. Prob. Code Ann. § 38(a)(2) (Vernon 1956).

89. La. Civ. Code Ann. art. 911 (West 1952).

90. Cal. Prob. Code § 227 (West 1956); Me. Rev. Stat. tit. 18, §§ 851, 1001(7) (1964); Mich. Comp. Laws Ann. § 702.80 (Second) (Cum. Supp. 1978–79), § 702.93(4)–(5) (1968); Minn. Stat. Ann. § 525.16(5) (West 1975) (requirement that there be no surviving spouse rather than that the decedent be unmarried; further requirement that the decedent be without issue); Nev. Rev. Stat. § 134.070–.080 (1973); N.H. Rev. Stat. Ann. § 561.2 (1974) (brothers and sisters or their issue are the designated takers; thus, the statute does not require that these persons be the issue of the parent); Okla. Stat. tit. 84, § 213 (Seventh)–(Eighth) (1971).

Except for Minnesota, these statutes have the effect of disinheriting nonmarital children of a minor, as they apply whenever a decedent dies under age and not having been married, regardless of whether issue survive the decedent. See notes 162–79 *infra* and accompanying text for further discussion of the inheritance right of nonmarital children.

Connecticut has enacted a statute of limited scope for the disposition of property from the estate of a minor who dies unmarried and without issue. If a child dies after his parent's death but before any legal distribution of the parent's estate, that part of the parent's estate that would have gone to the now-deceased child shall be distributed as if the child had predeceased the parent. Conn. Gen. Stat. Ann. § 45-276 (West 1960).

donor-parent if living.[91] A Louisiana statute provides that if a person dies without issue owning real property received by inter vivos gift from an ancestor, that ancestor shall receive the property back unless the person provides otherwise by will.[92] Under another statutory provision in Kentucky, if a person 18 or under dies without issue owning real property received from a parent by gift or succession, the property shall be distributed to the parent if living and if not to the parent's kindred. If no kindred of the parent survive, the other parent and that parent's kindred can share in this property.[93] Again, marital status is not relevant.

These types of provisions are theoretically appealing because they seem to provide precisely for the situation hypothesized when the general statutes were designed. For practical reasons, however, they should be discouraged.[94] They create statutory construction issues, such as (1) the types of transfers to the child included within the statutory language; (2) qualification as unmarried if a person had been previously divorced or widowed; and (3) qualification as dying without issue if a person had a child who predeceased the decedent. Furthermore, probate administration is made substantially more complicated with the added requirements of tracing and the need to account for accretion to the property received.[95] Finally, the Kentucky and Louisiana statutes that apply regardless of whether decedent is survived by a spouse seem contrary to public policy and the dispository preferences of intestate decedents.[96]

Prior will studies provide only limited data with respect to decedents survived only by the family of orientation. A general observation permitted by the findings is that the older the decedent, the less likely blood relationships will be determinative, because these decedents have had an opportunity for close association with unrelated persons or with one sibling to the exclusion of the others or with charitable organiza-

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91. Ky. Rev. Stat. § 391.020(1) (1972). California and Hawaii have similar statutes except that the decedent must not be survived by a spouse and it applies to both realty and personalty. Cal. Prob. Code § 229(b) (West 1956) (parent or grandparent); Haw. Rev. Stat. § 560:2-103(4), (5) (Supp. 1977) (grandparent or great-grandparent).

92. La. Civ. Code Ann. art. 908 (West 1952). See also *id.* art. 909 (applies to dowry that ancestor settled on the decedent).

93. Ky. Rev. Stat. § 391.020(2) (1972).

94. Cf. Chaffin, *supra* note 78, at 14–16 (criticism of ancestral estates in general). These provisions, however, have limited practical significance because of the infrequency of a minor dying intestate with property derived from a single parent. See 7 Powell, *supra* note 9, ¶ 1001, at 676.

95. These problems are most acute for personal property.

96. See notes 103–13 *infra* and accompanying text.

tions.[97] Consequently, an intestacy statute is unlikely to satisfy the dispository wishes of the unmarried childless *older* decedent.

In contrast, young adults are more likely to view parents and siblings as proper claimants of their estates because these persons are likely to represent the decedent's only developed relationships. Moreover, they are less likely to have executed wills at the time of their death.[98] Consequently, satisfying the probable dispository desires of the unmarried childless *young* adult should be the focus of discussion. Unfortunately, however, data concerning the dispository preferences of young adults are difficult to obtain.

In an attempt to identify the preferences of these young decedents,

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97. Demographic data concerning the age of unmarried, childless testators studied were not indicated in the published studies. Given the typical age of testators (see notes 64–70 *supra* and accompanying text), the cases studied presumably involved older persons. The nature of the beneficiaries named in the wills also indicates that the decedents were older. In the Dunham study, 54 percent of those persons survived by only brothers and sisters died testate. Dunham, *supra* note 15, at 252. Of these testate decedents, 89 percent avoided the statutory succession pattern of equality of distribution among siblings. *Id.* Also of interest is that 10 of the 15 charitable gifts that occurred in the estates studied appeared in estates in which brothers and sisters were the closest relatives of the deceased. *Id.* at 254. In the Browder study, there were 53 cases in which no spouse or issue survived. Browder, *supra* note 42, at 1311. In 5 cases, the testators were not survived by any heirs. *Id.* at 1312. In 1 case the testator was survived only by parents. *Id.* In 43 cases, testator was survived by siblings or their issue. *Id.* Browder classified the wills as follows:

> [T]hirteen wills made dispositions limited to persons designated as heirs; twelve excluded all heirs except for nominal bequests; twenty distributed property among one or more heirs and one or more others; twenty-two made gifts to nonrelatives or persons whose identity was not indicated; and eleven included charitable bequests.

Id. In the Sussman study, for the two estates where the decedent testator was survived by parents and siblings, the wills provided for distribution to those siblings who were expected to care for the surviving parents. Sussman, *supra* note 15, at 95–96. In interviews with 10 survivors who were in a similar situation, the following dispositions were provided in their executed wills: 4 gave their entire estate to their parent or parents; 2 gave the estate to siblings for the specific purpose of caring for parents; 2 gave the parents 50 percent and 75 percent of the estate, respectively, and the balance of the property was given to siblings who were close to the parents; 1 gave the entire estate to siblings, and 1 young decedent gave the estate in the following manner:

> [The 25-year-old interviewee] has insurance set up in a trust fund for his younger brothers and sisters, those who are living at home. His mother is the executrix. "I figured Mother would be hard pressed to get them through school. This would be a way of assuring they get to college. Anything left over goes to Mother." Excluded are any that are married and also a brother who is a priest and a sister who is a nun.

Id. at 96. When no parents survived and the decedent's heirs were only siblings and their descendants, the pattern of disposition was even more diverse, according to Sussman. Only 7 of 36 decedents followed the Ohio intestacy statute of distributing the property equally to siblings or to their descendants per stirpes. *Id.* at 103–4. Of those survivors with executed wills who were interviewed, 14 of 33 followed the Ohio intestacy statute. *Id.* See also *id.* at 104–7 for description of 6 cases where the decedent was survived by siblings or their issue; *id.* at 111–18 for further discussion of decedents and survivors whose nearest relatives are calculated through their family of orientation; *id.* at 136–38 for description of deviations from the intestacy statute in the final distribution of intestate decedents' estates.

98. See notes 64–66 *supra*, the note to table 4 *supra*, and accompanying text.

the interviewers presented to respondents the following hypothetical situations:

1. Indicate the percentage of your estate that you would want to give to each survivor if you are survived by your father and an adult brother and sister.
2. Indicate the percentage of your estate that you would want to give to each survivor if you are survived by your father, your mother, and an adult brother and sister.

Tables 5 and 6 describe the respondents' preferences.

TABLE 5

The Four Dominant Distribution Patterns for the Father-Brother-Sister Relation Set (Percent)[a]

Distribution Pattern by Percent of Estate to:			Percent of Respondents	
Father	Brother	Sister	in Pattern	*N*
100	0	0	29.2	219
50	25	25	15.4	115
33	33	33	36.4	273
0	50	50	7.6	57
Other			11.3	85
Total			99.9	749

[a]1 missing case.

TABLE 6

The Five Dominant Distribution Patterns for the Father-Mother-Brother-Sister Relation Set (Percent)[a]

Distribution Pattern by Percent of Estate to:				Percent of Respondents	
Father	Mother	Brother	Sister	in Pattern	*N*
100	0	0	0	7.3	55
0	100	0	0	1.6	12
50	50	0	0	31.9	239
25	25	25	25	40.3	302
0	0	50	50	7.1	53
Other				11.7	88
Total				99.9	749

[a]1 missing case.

Although no dominant consensual dispository patterns emerge from the responses, the data indicate that respondents were in agreement about some general principles of distribution. In both relation sets claimants in the same generation were treated equally. Over 95 percent

of the respondents treated brothers and sisters equally.[99] Similarly, over 89 percent of the respondents treated the parents equally.[100] No respondents gave the entire estate to the father and brother or to the mother and sister. Contrary to the majority of intestacy statutes, respondents preferred that both parents and siblings share in the estate. Only 30 percent of respondents favored giving the entire estate to the father in the father-brother-sister relation set, whereas 37 percent favored an equal division among the three. Similarly, only 32 percent advocated leaving their entire estate to the father and mother, whereas 40 percent of the respondents favored an equal division between parents and siblings in the father-mother-brother-sister relation set.[101] Interestingly, 41 percent of the respondents disinherited the siblings when two parents were assumed to be alive, while only 29 percent did so when respondents were asked to assume that only one parent survived.[102]

The authors hypothesized that wealthier persons might favor siblings to parents so as to avoid incurring probate administration and death taxes on substantial amounts of property twice within a short period. Neither actual estate size nor family income, however, appears to affect respondents' dispository patterns with respect to the family of orientation relation sets. For further evidence that wealth does not affect dispository preferences with respect to the family of orientation, see appendix table A1.

In summary, although this sample did not include young unmarried persons (the persons most likely to be affected by this intestacy provision), these findings raise doubts about the appropriateness of intestacy statutes that disinherit siblings in favor of parents or parent. The disadvantage of subjecting the property to possible probate administration

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99. In the father-brother-sister relation set, the siblings were treated unequally in 33 cases, including 10 cases in which the brother received 100 percent of the estate and 15 cases in which the sister received 100 percent of the estate.

In the father-mother-brother-sister relation set, the siblings were treated unequally in 15 cases, including 5 cases in which the brother received 100 percent of the estate and 6 cases in which the sister received 100 percent of the estate.

100. Father and mother were treated unequally in 81 cases, including 54 cases in which the father received 100 percent of the estate and 11 cases in which the mother received 100 percent of the estate.

101. Accord, Illinois study, *supra* note 29, at 724.

102. Accord, *id.* Distribution to siblings rather than parents may not indicate neglect of the parents but rather that the siblings would care for the parents. See note 97 *supra*. The distribution to siblings rather than to parents may also indicate that the respondents considered their parents financially able to care for themselves.

and death taxes twice within a short period coupled with this new data suggest that legislatures should reconsider this aspect of their state's intestacy statute.

2. Distribution Between Spouse and Family of Orientation

When a person marries, the family of orientation is displaced to some extent by the spouse as the natural object of the person's bounty. Until children are born, however, an individual can afford to assist parents and siblings financially and has more time to maintain close relations with his or her family of orientation. Typically, childless couples are either young and recently married or older with perhaps one or both of the spouses married previously.[103] For the young married decedent, the surviving spouse may not have as yet emerged as the primary kin obligation. Moreover, accumulated wealth may have been derived from the decedent's parents. Therefore, as noted in the previous section,[104] fairness may require parents to share in the estate. The older childless couple may have had little incentive to become financially interdependent except to the extent necessary to provide satisfactory living arrangements. Consequently, just as for the young childless couple, the family of orientation is less likely to have been displaced by the surviving spouse. In addition to these social dynamics, legislatures have traditionally been reluctant to allow a spouse to share in the estate in preference to the decedent's kin because of the likelihood that the decedent's wealth would then be permanently removed from the decedent's bloodline.[105]

The majority of intestate succession statutes allow the parent or parents of the married childless decedent to share in the estate along with the spouse. The specific division of estates by these statutes varies considerably.[106] Seventeen states provide that the spouse receive the en-

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103. See Mulder, *supra* note 15, at 312–13.

104. See note 77 *supra* and accompanying text.

105. P. W. Hogg, Distribution on Intestacy in Ontario, 11 Osgoode Hall L.J. 479, 501–2 (1973); Mulder, *supra* note 15, at 312–13; New Intestacy Rules—II, *supra* note 78, at 739.

106. Statutes in 18 jurisdictions provide for a fixed dollar amount to the spouse with the balance of the estate to be shared by the parents or parents and spouse. Alaska Stat. §§ 13.11.010(2), .015(2) (1972); Conn. Gen. Stat. Ann. § 45-276 (West 1960), § 46-12 (West 1978); Del. Code tit. 12, §§ 502(2), 503(2) (Cum. Supp. 1977); Idaho Code §§ 15-2-102(a)(2), (b)(1), -103(b) (Cum. Supp. 1977) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Iowa Code Ann. § 633.212 (West Cum. Supp. 1978–79), § 633.219(2) (West 1964); Me. Rev. Stat. tit. 18, §§ 851, 1001(1), (3)–(5) (1964) (after spouse's share, parents share equally in residue; if only one parent survives, that parent receives one-half the residue and the siblings share equally in the remainder; if no siblings, the surviving parent receives the entire residue); Mass. Ann. Laws ch. 190, § 1(1) (Michie/Law. Co-op Cum. Supp. 1978), ch. 190, §§ 2, 3(2)-(4) (Michie/Law. Co-op 1969); Neb. Rev. Stat. §§ 30-2302(2), -2303(2) (1975); N.H. Rev. Stat. Ann. § 561:1(I)(b), (II)(b) (1974); N.J. Rev. Stat. §§ 3A:2A-34(b), -35(b) (Cum. Supp. 1978–79) (effective Aug. 29, 1979); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(3), (4) (McKinney 1967); N.D.

tire estate owned by the decedent at death, regardless of whether the decedent is survived by a parent.[107] A large minority of states permit

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Cent. Code §§ 30.1-04-02(2), -03(2) (1976); Decedents, Estates and Fiduciaries, Pub. Act No. 23, § 1, 1978 Purdon's Pa. Legis. Serv. 33 (West) (to be codified as 20 Pa. Cons. Stat. Ann. §§ 2102(2), 2103(2) (Purdon)); R.I. Gen. Laws §§ 33-1-1 (Second), -5 to -6, -9, -10 (First), (Third) (1969), 2 Est. Planning (P-H) ¶ 2732 (to be codified as R.I. Gen. Laws §§ 33-25-2 to -6) (fixed dollar amount only applies to personalty owned by the decedent at death; spouse receives a life estate in all realty owned by the decedent at death); S.D. Compiled Laws Ann. § 29-1-6 (1976); Utah Uniform Prob. Code §§ 75-2-102(1)(b), -103(1)(b) (1977); Vt. Stat. Ann. tit. 14, § 551(2)–(3) (1974); Wyo. Stat. § 2-3-101(a)(ii) (1977). The UPC also provides for this manner of distribution. UPC §§ 2-102(2), 2-102A(1)(ii), 2-103(2).

Statutes in 10 jurisdictions provide that the spouse receive one-half of the estate and the parent or parents share equally in the remaining one-half of the decedent's estate. Cal. Prob. Code §§ 201, 223 (West 1956) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); D.C. Code §§ 19-304, -308 (1973); Haw. Rev. Stat. §§ 560:2-102(2), -103(2) (Supp. 1977); Ky. Rev. Stat. §§ 391.101(2), .030 (Cum. Supp. 1976), §§ 391.020, 392.020 (1972) (minor exceptions to the general pattern of 50 percent to the spouse and 50 percent to the parents); 2 Est. Planning (P-H) ¶ 2701 (to be codified as Md. Est. & Trusts Code Ann. § 3-102(c)), Md. Est. & Trusts Code Ann. § 3-104(b) (1974); Mich. Comp. Laws Ann. § 702.80 (Second) (Cum. Supp. 1978–79), § 702.93 (1968) (minor exceptions to the general pattern of 50 percent to the spouse and 50 percent to the parents); Mo. Ann. Stat. § 474.010(1)(a), (2)(b) (Vernon 1956) (if any siblings survive the decedent, they share equally with their parent or parents in the remaining 50 percent of the decedent's estate); Nev. Rev. Stat. § 123.250 (1977), § 134.050(1) (1973) (this distribution only applies to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Okla. Stat. tit. 84, § 213 (Second)–(Third) (1971) (in all cases where the property is acquired by the joint industry of the husband and wife during coverture and there is no issue, the whole of such estate shall go to the surviving spouse. If the decedent is a minor leaving no issue, apparently whether or not the decedent is survived by a spouse, the estate must go to the parents equally if they live together; and if they do not live together, to the parent having had care of the decedent); S.C. Code § 20-3-20(2), (8) (1976) (after spouse's share, parents and siblings share equally in remainder).

Statutes in five jurisdictions provide for unique patterns of distributions between spouse and parent or parents. Ala. Code §§ 43-3-1(2)–(4), -10, -12, -5-1 to -5, -20 to -23, -40 to -53 (1975) (if only one parent survives, siblings share equally with parent in real estate; spouse does have dower and curtesy rights); Ind. Code § 29-1-2-1(a)(3), (c)(2) (1976); La. Civ. Code Ann. arts. 903–904, 911, 915 (West 1952), art. 2382 (West Cum. Supp. 1978) (one-fourth of separate property to each parent surviving, residue to siblings or their descendants; one-half of decedent's share of community property to parents or survivor, one-half to spouse; also, spouse may be entitled to special marital portion); N.C. Gen. Stat. §§ 29-14(3), -15(3) (1976); Tex. Prob. Code Ann. §§ 38(a)(2), (b)(2), 45 (Vernon 1956) (as to separate property, after spouse's share, parents share equally; if only one surviving parent, that parent receives one-half the residue with the siblings sharing equally in the remainder; as to community property, all passes to surviving spouse); Wash. Rev. Code § 11.04.015(1)(a), (c), (2)(b) (Cum. Supp. 1978) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death).

107. Ariz. Rev. Stat. § 14-2102(1) (1975); Colo. Rev. Stat. § 15-11-102(1)(a) (1973); Fla. Stat. Ann. § 732.102(1)(a) (West 1976); Ga. Code Ann. §§ 113-902, -903(1) (1975); Ill. Rev. Stat. ch. 110½, § 2-1(c) (1977); Kan. Stat. § 59-504 (1976); Minn. Stat. Ann. § 525.16(4)(b) (West 1975); Miss. Code Ann. §§ 91-1-7, -11 (1972); 1974 Mont. Laws ch. 365, § 1, at 1387 (to be codified as Mont. Rev. Codes Ann. § 91A-2-102(1)); N.M. Stat. Ann. § 32A-2-102(A)(1), (B) (Supp. 1976–77); Ohio Rev. Code Ann. § 2105.06(D) (Page 1976); Or. Rev. Stat. § 112.035 (1977); Tenn. Code Ann. § 31-203(1) (Supp. 1977); Va. Code § 64.1-1 (Second) (Cum. Supp. 1977), § 64.1-11 (1973); W. Va. Code §§ 42-1-1(b), -2-1 (1966); Wis. Stat. Ann. § 852.01(1)(a)(1) (West 1971).

Arkansas permits the surviving spouse to receive the entire estate only if the decedent and spouse have been married for three years or more. Ark. Stat. Ann. § 61-137 (Cum. Supp. 1975), § 61-149(b)(1971). A surviving spouse married to the decedent for less than three years receives a dower or curtesy interest in addition to 50 percent of the balance of estate. *Id.* §§ 61-201 to -233 (1971). The remaining estate goes to the parent or parents. *Id.* § 61-149(d).

collaterals and their descendants to share in the estate with the spouse if the parents have predeceased the decedent.[108] Most states, however, provide that the spouse should receive the entire intestate estate in such circumstances.[109]

The prior will studies provide only limited data with respect to the distribution of an estate between a surviving spouse and the family of orientation. Of the cases studied, the majority of testators provided that the spouse receive the entire estate.[110]

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108. Ala. Code §§ 43-3-1(5), -10, -12, -5-1 to -5, -20 to -23, -40 to -53 (1975); Cal. Prob. Code §§ 201, 223 (West 1956) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); D.C. Code §§ 19-304, -309 (1973); Iowa Code Ann. § 633.212 (West Cum. Supp. 1978–79), § 633.219(3) (West 1964); Ky. Rev. Stat. §§ 391.010(3), .030 (Cum. Supp. 1976), §§ 391.020, 392.020 (1972); La. Civ. Code Ann. arts. 904, 914–915 (West 1952), art. 2382 (West Cum. Supp. 1978); Me. Rev. Stat. tit. 18, §§ 851, 1001(1), (4)–(6) (1964); Mass. Ann. Laws ch. 190, § 1(1) (Michie/Law. Co-op Cum. Supp. 1978), ch. 190, §§ 3(5)–(6) (Michie/Law. Co-op 1969); Mich. Comp. Laws. Ann. § 702.80 (Second) (Cum. Supp. 1978–79), § 702.93 (1968); Mo. Ann. Stat. § 474.010(1)(a), (2)(b) (Vernon 1956); Nev. Rev. Stat. §§ 123.250, 134.050(2) (1973) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Okla. Stat. tit. 84, § 213 (Second) (1971) (see note 106 *supra* for discussion of exceptions to this general rule); R.I. Gen. Laws §§ 33-1-1 (Third), -2, -5 to -6, -9, -10 (First), (Third) (1969); S.C. Code § 21-3-20(2)–(5), (8) (1976); S.D. Compiled Laws Ann. § 29-1-6 (1976); Tex. Prob. Code Ann. §§ 38(a)(3)–(4), (b)(2), 45 (Vernon 1956) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Vt. Stat. Ann. tit. 14, § 551(2), (4)–(5) (1974); Wash. Rev. Code § 11.04.015(1)(a), (c), (2)(c) (Cum. Supp. 1976) (this distribution only applies to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Wyo. Stat. § 2-3-101(a)(ii) (1977).

109. In addition to those 17 state statutes cited in note 107 *supra*, the following intestate succession laws provide that the surviving spouse receive the entire estate when the decedent is not survived by issue or parents. Alaska Stat. § 13.11.010(1) (1972); Conn. Gen. Stat. Ann. § 46-12 (West 1978); Del. Code tit. 12, § 502(1) (Cum. Supp. 1977); Haw. Rev. Stat. § 560:2-102(1) (Supp. 1977); Idaho Code § 15-2-102(a)(1), (b)(1) (Cum. Supp. 1977); Ind. Code § 29-1-2-1(a)(4) (1976); 2 Est. Planning (P-H) ¶ 2701 (to be codified as Md. Est. & Trusts Code Ann. § 3-102(d); Neb. Rev. Stat. § 30-2302(1) (1975); N.H. Rev. Stat. Ann. § 561:1(I)(a) (1974); N.J. Rev. Stat. § 3A:2A-34(a) (Cum. Supp. 1978–79) (effective Aug. 29, 1978); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(5) (McKinney 1967); N.C. Gen. Stat. § 29-14(4) (1976); N.D. Cent. Code § 30.1-04-02(1) (1976); Decedents, Estates and Fiduciaries, Pub. Act No. 23, § 1, 1978 Purdon's Pa. Legis. Serv. 33 (West) (to be codified as 20 Pa. Cons. Stat. Ann. § 2102(1) (Purdon)); Utah Uniform Prob. Code § 75-2-102(1) (1977).

The UPC also provides for the spouse to receive the entire estate in this situation. UPC §§ 2-102(1), 2-102A (1)(i).

Arkansas only allows the brothers and sisters to share in the estate if the surviving spouse was married to the decedent less than three years. Ark. Stat. Ann. § 61-149(e)–(g) (1971).

110. Dunham studied only 6 cases where there was a surviving spouse but no children. In all but one of these cases the testator gave the surviving spouse all of the property. Dunham, *supra* note 15, at 253. Browder found that 9 of 13 wills in the sample provided that the spouse receive the entire estate. Browder, *supra* note 42, at 1308–9. Sussman found that in 33 of 37 cases where the testator was not survived by lineal descendants or ascendants but was survived by a spouse, the spouse received the entire estate. Sussman, *supra* note 15, at 86–87. In the survivor population, this distribution was found in 34 of 39 cases. *Id.* at 87. Unfortunately, Sussman does not delineate separate data for those cases where the decedent is survived by a spouse and parent or parents. See *id.* at 89. In the 226 cases where the lineal kin and a spouse survived the decedent, 85.8 percent of the testators bequeathed the entire estate to the spouse. Within the survivor sample (N = 367), 85.3 percent of the testators bequeathed the entire estate to the spouse.

To establish the public viewpoint as to the appropriate distributive pattern between the spouse and the family of orientation, the interviewers presented to respondents the following hypothetical situation:

> Indicate the percentage of your estate that you would want to give to each survivor if you are survived by your wife/husband and your mother.

The mother was chosen as the competing claimant to the spouse, rather than both parents or the father or siblings, because the authors hypothesized that this would be the most likely case where the respondent might feel an obligation to share the estate between the spouse and the family of orientation. A mother would traditionally be less likely to be thought of as self-sufficient. In addition, according to the hypothetical, the respondent is the closest living relative of the mother. If the respondents were to prefer the spouse to the mother in this question, as prior studies indicate they might, an inference that the spouse would be preferred even further to both parents, to father, and to siblings is justified. Table 7 describes the respondents' preferences. A large major-

TABLE 7

Distribution of Estate Between Spouse and Mother (Percent)[a]

Distribution Pattern by Percent of Estate to:		Percent of Respondents	
Spouse	Mother	in Pattern	*N*
100	0	70.8	530
51–99	1–49	18.6	139
50	50	10.3	77
0–49	51–99	0.3	3
Total		100.0	749

[a] 1 missing case.

ity of the respondents (70.8 percent) favored disinheriting the mother and distributing the property entirely to the spouse.[111] Neither the number of years married nor the presence or absence of children in the marriage appears to affect respondents' distribution patterns with respect to the spouse-mother relation set.[112]

111. Accord, Illinois study, *supra* note 29, at 725–26 (58.6 percent of the respondents gave 100 percent to the spouse when both parents were presumed alive; 54.4 percent gave 100 percent to the spouse when only the mother was presumed alive, and 59.7 percent gave the spouse 100 percent when only the father was presumed alive).

112. Of the 55 respondents who had no children, 69.1 percent gave the entire estate to the spouse. See appendix tables A2 and A3 for analysis of responses according to family status and number of years married.

Further investigation concerning distributive preferences of decedents survived by a spouse from a second marriage is necessary. Although special provision in the intestate succession statute for this situation may be appropriate, more evidence is needed before any recommendations can be made.

Unlike common law property states, the community property law states provide that wealth acquired during the marriage is owned equally by both spouses.[113] As noted in table 8, responses from persons

TABLE 8

Percentage of Estate to Spouse by State of Residence for Currently Married Respondents for Spouse-Mother Relation Set[a]

	Percent to Spouse			
State	100%	51%-99%	50%	Row *N*
Alabama	64.9	18.9	16.2	148
California	75.5	18.2	6.3	143
Massachusetts	64.3	25.2	10.5	143
Ohio	82.8	11.7	5.5	145
Texas	72.3	17.6	10.1	148
Column *N*	523	133	71	727

$\chi^2 = 22.8$; $df = 8$; $p = .004$. If Ohio data are excluded, $p = .08$; more Ohio respondents gave 100 percent of the estate to the spouse than did respondents from any of the other states. See tables 13 and 14 *infra*.

[a] 4 missing cases; in addition, for simplicity of presentation, 1 respondent who allocated less than 50 percent to the spouse was excluded.

residing in Alabama and Massachusetts (common law property states) are not significantly different from the responses of persons residing in California and Texas (community property states). The only state in which respondents reply in a significantly different manner is Ohio. Neither demographic characteristics nor peculiarities in the Ohio law explain divergent responses of persons residing in Ohio.

An underlying premise of the UPC, as well as of the other state statutes[114] that provide for a fixed dollar amount to go to the spouse before the family of orientation shares in the decedent's estate, is that a wealthier decedent is more likely to want to distribute a portion of the intestate estate to the family of orientation.[115] The guaranteed fixed dollar amount going to the spouse assures that a financially dependent spouse will not be left destitute and, therefore, there is no public policy reason not to honor the dispository wishes of these more wealthy decedents. The Sussman study appears to support this underlying

113. See Ariz. Rev. Stat. §§ 25-211, -214 (1976); Cal. Civ. Code §§ 5105, 5110 (West Cum. Supp. 1978); Idaho Code § 32-906 (1963), *construed in* Radermacher v. Radermacher, 61 Idaho 261, 100 P.2d 955 (1940); La. Civ. Code Ann. art. 2398 (West Cum. Supp. 1978), art. 2402 (West 1952); Nev. Rev. Stat. §§ 123.220, .225 (1977); N.M. Stat. Ann. § 57-4A-2 (Cum. Supp. 1975); Tex. Fam. Code Ann. tit. 1, §§ 5.01, .22 (Vernon 1975); Wash. Rev. Code Ann. § 26.16.030 (Cum. Supp. 1978).

114. See note 106 *supra*.

115. See Mulder, *supra* note 15, at 313; Wellman & Gordon, *supra* note 10, at 364.

assumption. It found that when lineal kin and a spouse survive the decedent, testators who own small estates leave the entire estate to the spouse more frequently than testators of larger estates.[116] The present study, however, found the relationship between estate size and the proportion of the estate left to the spouse when the decedent is also survived by a mother to be meaningful and in the opposite direction from Sussman's findings. The relationship between family income and the proportion of the estate left to the spouse was found to be statistically insignificant. Tables 9 and 10 show these results. The results in the present study are really not comparable to the Sussman data. Respondents in the present study had a wider range of estate and in-

TABLE 9

Percentage of Estate to Spouse by Actual Estate Size for Currently Married Respondents for Spouse-Mother Relation Set[a]

	Percent to Spouse			
Estate Size	100%	51%-99%	50%	Row *N*
$0-$12,999	67.6	19.1	13.2	68
$13,000-$25,999	69.8	14.2	16.0	106
$26,000-$49,999	69.8	24.8	5.4	129
$50,000-$99,999	69.5	20.3	10.2	246
$100,000 and over	80.2	12.2	7.2	181
Column *N*	527	132	71	730

$\chi^2 = 19.7$; $df = 8$; $p = .01$.
[a]1 missing case; in addition, for simplicity of presentation, 1 respondent who allocated less than 50 percent to the spouse was excluded.

TABLE 10

Percentage of Estate to Spouse by Family Income for Currently Married Respondents for Spouse-Mother Relation Set[a]

	Percent to Spouse			
Family Income	100%	51%-99%	50%	Row *N*
Under $8,000	67.7	16.9	15.3	124
$8,000-$13,999	72.0	19.0	9.0	211
$14,000-$19,999	73.1	18.1	8.8	182
$20,000-$24,999	69.4	19.4	11.1	108
$25,000 and over	77.6	16.8	4.7	106
Column *N*	527	133	71	731

$\chi^2 = 8.6$; $df = 8$; $p = .38$.
[a]For simplicity of presentation, 1 respondent who allocated less than 50 percent of the spouse was excluded.

116. Sussman, *supra* note 15, at 89–90.

come sizes than those persons surveyed by Sussman[117] who might have obtained the same results as found here had he been able to look at estates larger than $100,000.

A comparison of responses to the spouse-mother relation set assuming a hypothetical estate with responses assuming actual estate sizes provides further evidence that respondents with modest estates agree with the fixed dollar distribution pattern more than do wealthy respondents (see appendix table A4). When respondents were asked to imagine larger estates, the data show large consistent reductions in the number of respondents giving the entire estate to the spouse.[118] Conversely, when respondents were asked to assume smaller estates, the reduction in the number of respondents giving the entire estate to the spouse is either trivial, or when not trivial, the reduction is only half the magnitude found among the respondent group who assumed larger estates.[119] Thus the fixed dollar distribution pattern does not appear to represent the wishes of wealthy intestate decedents.[120] It receives greater support from relatively small estate owners who are only minimally affected by the distribution pattern found in these intestate succession laws.

In summary, regardless of the family status, length of time married, or wealth, the majority of the respondents want to leave their entire estates to the spouse. In addition to conforming to the stated preferences of the citizenry, permitting the spouse to inherit in preference to

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117. *Id.* at 90:

TABLE 5-2 PATTERN OF DISTRIBUTION, BY ECONOMIC CONDITION

	Pattern of Distribution	
Economic Condition	Spouse-All	Other
Decedent sample		
Mean net estate	$17,674	$44,235
Median net estate	10,000	19,000
	(N = 194)	(N = 32)
Survivor population		
Median income (per month)	$601–$800	$1,001–$1,500
Modal income (per month)	$401–$600	$1,500 and over
	(N = 313)	(N = 54)

118. Of the 120 respondents in this group who originally gave 100 percent of the estate to the spouse, 29 (24.2 percent) decided upon reconsideration of this relation set to allow the mother to share in the estate.

119. Of the 406 respondents in this group who originally gave 100 percent of the estate to the spouse, only 24 (5.9 percent) decided upon reconsideration of this relation set to allow the mother to share in the estate.

120. The research design in this study does not allow a conclusive answer to this question. Specifically, respondents with actual estates in the $50,000–$100,000 range should be asked to assume larger estates. In short, we do not know what would happen when wealthy people imagine that their property holdings have significantly increased. The key point to remember, however, is that more wealthy people do give their entire estates to their spouses. This basic fact contravenes the fixed dollar distribution pattern.

the family of orientation has the advantage of simplifying property titles and intestate succession statutes. Although there is some risk that financially dependent parents will not be protected and thus will become dependent on the state, this would seem to be the unusual situation, and therefore is more appropriately left to individuals to rectify through a will.

3. Distribution Between Spouse and Issue

Parents have major social and financial responsibilities to their children, especially when the children are minors. Husbands and wives have mutual responsibilities toward each other. During a person's lifetime these responsibilities may conflict. These conflicts are particularly apparent in family situations involving multiple marriages. A discussion of the complex issues raised by the latter situation is postponed in this analysis (see section 3(b) of this part).

a) Distribution between spouse and children when the spouse is the natural or adoptive parent □□ When the surviving spouse is also the natural or adoptive parent of the decedent's children, there is little risk that the children will be permanently deprived of the decedent's wealth.[121] The will studies provide no evidence that surviving spouses disinherit their children.[122] The risk of improvident financial management of the decedent's estate by the surviving spouse is more difficult to assess, but probably does not outweigh the risk that the spouse may be left without financial security. Consequently, in this situation the problem becomes one of balancing the interest of the children in obtaining some of the deceased's property without waiting for the surviving parent to die and the interest of the surviving spouse to have available the accumulated weath of the marriage so as to minimize the risk of financial insecurity.[123] Once the problem is so characterized, the claims of adult children to their parents' estates would seem to be less deserving than the claims of the surviving spouses. Adult children are likely to be self-supporting; therefore, a delay in inheritance or possibly even permanent disinheritance because of mismanagement by the surviving spouse does not warrant depleting the financial resources of the spouse, who is likely to have established a financial interdependence

121. For purposes of this discussion the authors assume that a child by a previous marriage of the decedent who is legally adopted by the decedent's spouse of a subsequent marriage will be treated as a natural child of the spouse for all purposes. This assumption corresponds to existing intestate succession statutes and to generally accepted notions of the status of the adopted child with regard to the adoptive parent.

122. Sussman, *supra* note 15, at 97-98; Dunham, *supra* note 15, at 257.

123. See Mulder, *supra* note 15, at 314-15.

with the decedent,[124] or even to be wholly dependent on the decedent. The claims of minor children are somewhat different. Minors depend on the decedent for their financial security. Distributing property to minors, however, requires appointment of a guardian, which leads to administrative procedures that are cumbersome and expensive.[125] Consequently, the minor may be better protected and have more funds available if the spouse-parent receives the funds. Moreover, state support laws impose a legal obligation on the surviving parent to support the child. Therefore, the child need not rely on the intestate succession statute for financial protection.[126] Previous will studies indicate testate decedents agree that the spouse should receive the entire estate.[127] Thus, those intestate succession statutes that distribute a substantial share of

124. See William W. Gibson, Jr., Inheritance of Community Property in Texas—a Need for Reform, 47 Tex. L. Rev. 359, 367–68 (1969); Kossow, *supra* note 17, at 239; O'Connell & Effland, *supra* note 18, at 211, 213.

125. See, e.g., Gibson, *supra* note 124, at 367. For a general discussion of guardianship, see William F. Fratcher, Toward Uniform Guardianship Legislation, 64 Mich. L. Rev. 983 (1966); Symposium on Guardianship, 45 Iowa L. Rev. 209 (1960). But see UPC § 3-915, Comment, which suggests that guardianship might not be always necessary in view of the combined effect of UPC §§ 3-915 and 5-103.

126. See Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 6.2 (St. Paul: West Publishing Co., 1968); Harry D. Krause, Family Law in a Nutshell § 18.1 (St. Paul: West Publishing Co., 1977).

127. Ward and Beuscher found that of the 37.4 percent of their sample wills (N = 163) in which testators disinherited one or more heirs, 40 percent of the wills bequeathed all or practically all of the estate to the surviving spouse. Ward & Beuscher, *supra* note 15, at 413.

Dunham found that in the 22 testate estates where the deceased was survived by spouse and children, 100 percent left all of the property to the surviving spouse. Dunham, *supra* note 15, at 252. See also *id.* at 252–53 nn. 21–22 for empirical data of beneficiaries named in employee pensions and death benefits.

Browder found that 26 of 54 testators left their entire estates to their spouse and not to their issue. Browder, *supra* note 42, at 1307. Of those 18 testators who distributed the estate to both spouse and issue, 6 designed their wills to give to the spouse only that amount equal to the maximum marital deduction for federal estate tax purposes. *Id.*

Sussman found that for those testators survived by a spouse and lineal kin (ancestors & descendants), 85.8 percent of the decedent testators (N = 226) and 85.3 percent of the testators (N = 367) in the survivor population provided that the spouse receive the entire estate. Sussman, *supra* note 15, at 89–90. See also *id.* at 133.

Perhaps even more interesting are the insights provided in the Sussman study from investigation of redistribution of the estate by the families in derogation of the decedent's will and the intestate succession statutes. Redistribution occurred in only 50 of the 360 (14 percent) testate cases for which interviews were obtained, and in 21 cases it was a car that was redistributed. Typically a spouse, as the sole beneficiary, gave the car to a child. In 17 of the remaining 29 cases, the decedent was survived by a spouse and issue. If the spouse was the sole beneficiary, the redistribution involved giving part or all of the estate to the children. From Sussman's case descriptions, these gifts carried out the surviving spouse's estate plan inexpensively and efficiently. If the spouse was not the sole beneficiary, redistribution occurred with children signing over part or all of their bequest to the surviving spouse. *Id.* at 122–23.

For the intestate cases, major redistributions occurred in over 50 percent of the cases. There were 74 cases in which the intestate decedent was survived by a spouse and lineal kin. In 60 of these cases the intestate succession pattern was not followed. In 19 of the cases, the estates were so small that the family allowances, etc., permitted the spouse to receive the entire estate. In 38 cases, the spouse received either all of the estate or more of the estate than the intestate share provided through redistribution. *Id.* at 125, 126–27.

Of the 31 cases studied in New Jersey in which testators were survived by spouse and children,

the estate to the decedent's children when a natural or adoptive parent survives appear to serve neither the community's needs nor the distributive preferences of intestate decedents.[128]

Largely in response to the findings in the will studies, states have

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the entire estate was bequeathed to the spouse in 80 percent of the wills. New Jersey study, *supra* note 29, at 278.

128. Statutes in 10 jurisdictions provide that the spouse receive one-half of the estate and the issue share the remaining one-half of the decedent's estate. Haw. Rev. Stat. §§ 560:2-102(2), -103(1) (Supp. 1977); Kan. Stat. §§ 59-504, -506 (1976); Ky. Rev. Stat. §§ 391.010(1), .030 (Cum. Supp. 1976), § 392.020 (1972); (minor exception to the general pattern of 50 percent to the spouse and 50 percent to the children); 2 Est. Planning (P-H) ¶ 2701 (to be codified as Md. Est. & Trusts Code Ann. §§ 3-102(b), -103); Mass. Ann. Laws ch. 190, § 1 (2) (Michie/Law. Co-op Cum. Supp. 1978), ch. 190, §§ 2, 3(1) (Michie/Law. Co-op 1969); Mo. Ann. Stat. § 474.010 (1)(a), (2)(a) (Vernon 1956); Or. Rev. Stat. §§ 112.025, .045(1) (1977); R.I. Gen. Laws §§ 33-1-1 (First), -10 (Second)-(Third) (1969), 2 Est. Planning (P-H) ¶ 2732 (to be codified as §§ 33-25-2 to -6) (the general pattern of 50 percent to spouse and 50 percent to children applies only to personalty owned by the decedent at death; spouse receives a life estate in all realty owned by the decedent at death); Wash. Rev. Code § 11.04.015(1)(a)-(b), (2)(a) (Cum. Supp. 1978) (this distribution only applies to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Wyo. Stat. § 2-3-101(a)(ii) (1977).

Statutes in 18 jurisdictions provide that the spouse receive one-third of the decedent's estate and the issue share the remaining two-thirds of the decedent's estate. Cal. Prob. Code §§ 201, 221 (West 1956) (this distribution only applies to the separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); D.C. Code §§ 19-303, -305 to -307 (1973); Ill. Rev. Stat. ch. 110½, § 2-1(a) (1977); Ind. Code § 29-1-2-1(a)(1), (c)(1) (1976); Me. Rev. Stat. tit. 18, §§ 851, 1001(1), (2) (1964); Mich. Comp. Laws Ann. § 702.80 (First) (Cum. Supp. 1978-79), § 702.93 (1968) (minor exceptions to the general pattern of one-third to the spouse and two-thirds to the children); Minn. Stat. Ann. § 525.16(1)-(2), (4)(a) (West 1975); Nev. Rev. Stat. §§ 123.250, 134.040(2) (1973) (this distribution applies only to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(1) (McKinney Cum. Supp. 1977-78) (minor exception to the general pattern of one-third to the spouse and two-thirds to the children); N.C. Gen. Stat. §§ 29-14(2), -15(2) (1976); Okla. Stat. tit. 84, § 213 (First) (1971); S.C. Code § 21-3-20(1), (8) (1976); S.D. Compiled Laws Ann. § 29-1-5 (1976); Tenn. Code Ann. §§ 31-203(2), -204(1) (Supp. 1977); Tex. Prob. Code Ann. §§ 38(b)(1), 45 (Vernon 1956) (general pattern of one-third to spouse and two-thirds to children applies only to separate personalty owned by the decedent at death; spouse receives a life estate in one-third of the separate realty owned by the decedent at death; the spouse receives no part of the community property owned by the decedent at death); Vt. Stat. Ann. tit. 14, §§ 401, 461, 474, 551(1) (1974) (spouse receives as much personalty as probate court assigns according to spouse's circumstances but not less than one-third of the estate); Va. Code §§ 64.1-1 (First), -11, -19 (Cum. Supp. 1978); W. Va. Code §§ 42-1-1(a), -2-1, 43-1-1 to -5, -7 to -20 (1966), § 43-1-6 (Cum. Supp. 1978) (spouse receives only a life estate in one-third of the realty owned by the decedent at death).

Statutes in 6 jurisdictions provide for unique patterns of distributions between spouse and issue. Ala. Code §§ 43-3-1(1), -10, -12, -5-1 to -5, -20 to -23, -40 to -53 (1975); Ark. Stat. Ann. § 61-137 (Cum. Supp. 1975), §§ 61-149(a), -201 to -233 (1971); Ga. Code Ann. §§ 113-902, -903(3)-(4) (1975); La. Civ. Code Ann. arts. 902, 915 (West 1952), arts. 916-916.1, 2382 (West Cum. Supp. 1978); Miss. Code Ann. §§ 91-1-7, -11 (1972); N.M. Stat. Ann. §§ 32A-2-102(A)(2), -102(B), -2-103(A) (Supp. 1976-77).

The portion of the estate going to the surviving spouse increases in some of these jurisdictions if the decedent is survived by only one child or the descendants of only one child. Ala. Code § 43-3-10 (1975); Cal. Prob. Code § 221 (West 1956); Ind. Code § 29-1-2-1(a)(2) (1976); Mich. Comp. Laws Ann. § 702.93(4)-(5) (1968); Minn. Stat. Ann. § 525.16 (3) (West 1975); Nev. Rev. Stat. § 134.040(1) (1973); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(2) (McKinney Cum. Supp. 1977-78); N.C. Gen. Stat. §§ 29-14(1), -15(1) (1976); Okla. Stat. Ann. tit. 84, § 213 (First) (1971); S.C. Code § 21-3-20(1), (8) (1976); S.D. Compiled Laws Ann. § 29-1-5 (1976); Tenn. Code Ann. §§ 31-203(2), -204(1) (Supp. 1977) (statute provides that the spouse receive one-third or a child's share of the entire estate, whichever is greater); Vt. Stat. Ann. tit. 14, §§ 461, 474 (1974).

amended their intestate succession statutes to provide the spouse a larger share of the estate. Most of these states have adopted the UPC recommendation of assuring the spouse a fixed dollar amount and then allowing the issue and spouse to share the balance remaining in the estate.[129] Arizona[130] and Montana[131] provide that the surviving spouse receive the entire estate.

Two hypothetical questions were asked of respondents to enable the investigators to evaluate these recent statutory changes and to acquire more data on individuals' preferences for having the spouse receive the entire estate rather than having it shared between spouse and children. The questions were:

1. How would you like your property distributed if you were survived by your (wife/husband) and a minor son and daughter both by your present marriage?
2. How would you like your property distributed if you are survived by (wife/husband), a minor child, and an adult child?

Tables 11 and 12 describe the respondents' preferred distribution to these questions.

When an adult child was included as a survivor, fewer respondents were willing to give the spouse the entire estate than when only minor children were the alternative takers. (These findings correspond to results obtained in the Illinois and New Jersey studies.[132]) Interestingly, however, adult children were not favored over minor children by these respondents. Apparently the respondents wanted to treat both children

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129. UPC §§ 2-102(3), -102A(1)(iii) (this distribution only applies to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Alaska Stat. §§ 13.11.010(3), .015(1) (1972); Colo. Rev. Stat. §§ 15-11-102(1)(b), -103(1)(a) (1973); Conn. Gen. Stat. Ann. § 45-274 (West 1960), § 46-12 (West 1978); Del. Code tit. 12, §§ 502(3), 503(1) (Cum. Supp. 1977); Fla. Stat. Ann. §§ 732.102(1)(b), .103(1) (West 1976); Idaho Code §§ 15-2-102(a)(3), (b), -103(a) (Cum. Supp. 1977) (this distribution only applies to separate property owned by the decedent at death; the spouse receives all the community property owned by the decedent at death); Iowa Code Ann. § 633.211 (West Cum. Supp. 1978–79), § 633.219(1) (West 1964); Neb. Rev. Stat. §§ 30-2302 (3), -2303(1) (1975); N.H. Rev. Stat. Ann. § 561:1(I)(c), (II)(a) (1974); N.J. Rev. Stat. §§ 3A:2A-34(c), -35(a) (Cum. Supp. 1978–79) (effective Aug. 29, 1979); N.D. Cent. Code § 30.1-04-02(3), -03(1) (1976); Ohio Rev. Code Ann. § 2105.06(B)–(C) (Page 1976) (balance to spouse increases if only one child or his lineal descendants survives); Decedents, Estates and Fiduciaries, Pub. Act No. 23, § 1, 1978 Purdon's Legis. Serv. 33 (West) (to be codified as 20 Pa. Cons. Stat. Ann. §§ 2102(3), 2103(1) (Purdon)); Utah Uniform Prob. Code §§ 75-2-102(1)(c), -103(1)(a) (1977); Wis. Stat. Ann. § 852.01(1)(a)(2), (b) (West 1971) (balance to spouse increases if only one child or his issue survives).

130. Ariz. Rev. Stat. § 14-2102(1) (1975).

131. 1974 Mont. Laws ch. 365, § 1, at 1387 (to be codified as Mont. Rev. Codes Ann. § 91A-2-102(1)).

132. See Illinois study, *supra* note 29, at 730; New Jersey study, *supra* note 29, at 270–72 (when presented with two contrasting hypotheticals, a young parent with minor children and an older parent with young adult children, a larger percentage of the sample participants preferred leaving the entire estate to the spouse in the first hypothetical than in the second).

equally regardless of age. Of the 361 respondents who distributed some property to the children, 71.5 percent treated the children equally and only 14.1 percent of the respondents favored the adult child over the minor child.

Although a majority of the respondents favor the developing statutory trend of giving the entire estate to the surviving spouse rather than permitting the children to share, significantly fewer respondents preferred this distribution than did the testators studied by Dunham, Browder, and Sussman. The findings in the present study correspond more nearly to the results obtained in the Illinois and New Jersey studies, which also interviewed living persons.[133]

TABLE 11

Distribution of Estate Among Spouse, Minor Son, and Minor Daughter (Percent)[a]

Distribution Pattern[b] *by Percent of Estate to:*			Percent of Respondents	
Spouse	Minor Son	Minor Daughter	in Pattern	*N*
100	0	0	58.3	437
51–99	1–24	1–24	6.8	51
50	25	25	23.4	175
1–49	25–49	25–49	9.7	73
0	50	50	1.7	13
Total			99.9	749

[a] 1 missing case.
[b] Except in one case, the children were treated equally. The exception provided the following distribution: spouse, 75 percent; son, 20 percent; daughter, 5 percent.

TABLE 12

Distribution of Estate Among Spouse, Minor Child, and Adult Child (Percent)[a]

Distribution Pattern by Percent of Estate to:			Percent of Respondents	
Spouse	Minor Child	Adult Child	in Pattern	*N*
100	0	0	51.6	385
51–99	1–24	1–24	10.9	81
50	25	25	21.3	159
33	33	33	7.4	55
Other			8.8	66
Total			100	746

[a] 4 missing cases.

133. See Illinois study, *supra* note 29, at 728–29; New Jersey study, *supra* note 29, at 267–70, 278 (the hypothetical presented a decedent survived by a widow and two children: 30 percent of the telephone survey sample gave the widow all of the estate; but among the New Jersey testators studied, 80 percent gave their entire estate to their spouses). Interestingly, results similar to those obtained in the present study were obtained from a sample testing of a questionnaire designed by Dunham similar to the one used here. Dunham, *supra* note 15, at 260.

In an attempt to explain why living persons are less willing than decedent testators to distribute the entire estate to the surviving spouse, interviewers asked respondents who gave minor children 50 percent or more of the estate to provide a rationale for their dispository schemes. From the explanations offered, many of these respondents apparently felt that their spouses were untrustworthy. They worried about the possibility that the children might be disinherited, especially if the surviving spouse remarried. At the time of will execution, testators may be reluctant to express their concerns about the trustworthiness of their spouses to their attorneys especially if, as happens so frequently, the couple is having the same attorney draft both wills at the same time and the one spouse has already indicated an intention to bequeath all the property to the other. In addition to raising questions about trustworthiness, respondents compared the needs of their spouses with the needs of their children and decided that the children's needs were greater. Testators who raise this issue with their attorneys are likely to be advised that distribution to the spouse will best achieve their goals. Thus, the intercession of an attorney appears to explain, at least in part, the discrepancy between the preferences of living persons and decedent testators.

To determine whether demographic differences between the samples studied explain the discrepancy, the authors analyzed the responses by sex,[134] age, education, occupational status, family income, estate size, family status,[135] and state of residence. Except for state of residence, none of these variables helped explain the discrepancy. Tables 13 and 14 show the data by state of residence. More respondents from the two southern states, Alabama and Texas, preferred to allow children to receive a share of the estate than respondents from California, Massachusetts, and Ohio. Prior will studies were conducted in the

134. An explanation for the discrepancy between prior will studies and the results of the Illinois study was that male decedents dominated the prior studies. In the Dunham study, 37 of the 44 decedents who died leaving a surviving spouse and children were males. Dunham, *supra* note 15, at 249. Although a similar breakdown of the Sussman study is not available, data indicate that men dominated the surveyed decedent population. Of the 659 decedents surveyed, 402 were males. Sussman, *supra* note 15, at 71. See also *id.* at 51 for breakdown by sex of the survivor population. In the Illinois study significantly fewer female respondents than male respondents wanted their spouse to receive the entire estate. Of the male respondents with children, 73.5 percent gave the entire estate to their wives. On the other hand, only 52.6 percent of the female respondents with children wanted their husbands to receive their entire estates. Illinois study, *supra* note 29, at 729–30, 730 n.12. Although the results were significant, the magnitude of the differences between male and female responses obtained in the Illinois study did not emerge in the present study. See appendix tables A5 and A6.

135. Another explanation for the discrepancy between prior will studies and the Illinois study is that persons without children in the Illinois study were less willing to give the entire estate to the spouse when the hypothetical included children. Illinois study, *supra* note 29, at 729–30. Family status, however, did not appear to affect the distributive preferences of the respondents in the present study.

Midwest (Ohio and Illinois) where, according to the findings, there appears to be a greater willingness to give the spouse the entire estate.

Although identification of the state of residence helps explain why significantly fewer respondents in this study favored giving the entire estate to the spouse than did testators reported in prior will studies,

TABLE 13

Percentage of Estate to Spouse by State of Residence for Currently Married Respondents for Spouse–Minor Son–Minor Daughter Relation Set[a]

State	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
Alabama	48.6	10.1	25.7	15.5	148
California	62.5	9.7	22.2	5.6	144
Massachusetts	62.2	5.6	19.6	12.6	143
Ohio	71.7	3.4	17.9	6.9	145
Texas	49.3	6.1	33.1	11.5	148
Column *N*	428	51	173	76	728

$\chi^2 = 34.8$; $df = 12$; $p = .0005$.
[a]4 missing cases.

TABLE 14

Percentage of Estate to Spouse by State of Residence for Currently Married Respondents for Spouse–Minor Child–Adult Child Relation Set[a]

State	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
Alabama	42.6	14.2	27.0	16.2	148
California	56.3	17.4	20.8	5.6	144
Massachusetts	55.2	11.2	20.3	13.3	143
Ohio	67.6	6.2	17.9	8.3	145
Texas	38.5	10.8	39.2	11.5	148
Column *N*	378	87	183	80	728

$\chi^2 = 50.2$; $df = 12$; $p > .0000$.
[a]4 missing cases.

other and more difficult questions arise. The state of residence of the respondents was a significant factor only with respect to hypothetical situations which concerned the spouse. Neither demographic characteristics nor peculiarities in the law explain why more people in Alabama and Texas prefer to allow their children to share in the estate than do people in California, Massachusetts, and Ohio. Nevertheless, these findings raise some doubt concerning the appropriateness of a uniform intestate succession statute as promulgated in the UPC. If the intestacy statute should mirror the probable distributive preferences of intestate decedents, uniformity among the states may not be appropriate. Before

any such conclusion can be made, however, further empirical research similar to this study of other regions in the country is necessary. Additionally, further research should be conducted to determine if the geographical differences demonstrated in the above data continue when testate estates outside the Midwest are investigated. The differences between indicated citizen preferences in different geographical sections of the United States may disappear when attorneys become involved and advise their clients about the advantages and disadvantages of distributing part of the estate to children. If so, an intestate succession statute in all states which distributes all or a substantial portion of the intestate's estate to the spouse would seem appropriate.

In a final effort to understand the differences between the preferences of living persons and decedent testators, the authors looked to the title to property. To the extent that married respondents hold title to their property with their spouses in joint tenancy with right of survivorship, children will not be able to participate in their estate. If the substantial minority of respondents who preferred distributing part of their estates to children in fact do not own that portion of their property exclusively, explaining their responses becomes less important. The following question was posed to each respondent:

> For each of the property or items that I am going to read to you, please tell me if you own the item (or are in the process of buying it), and whose name title is in:
>
> Auto, Bonds, Stocks, House, Other Realty, and Savings.

Respondents were not asked to differentiate among joint tenancies with right of survivorship, tenancies by the entirety, tenancies in common, and community property because these legal distinctions are not likely to be recognized by laypersons. It may be that respondents owned less jointly held property with right of survivorship than they claimed because they did not understand the nature of the ownership. Of the 732 respondents who were married, only 53.0 percent claimed that except for their autos they held all their property jointly with their spouses (table 15). As would be expected, there was a direct relationship between the amount distributed to the spouse and the amount of wealth held jointly with the spouse. More important, the substantial minority who preferred to allow their children to share in their estates apparently retained that option by holding some or all of their property separately.

The UPC, as well as other state statutes[136] that provide for a fixed dollar amount to go to the spouse before the children share in the

136. See note 129 *supra.*

TABLE 15

Percentage of Estate to Spouse by Title to Property for Currently Married Respondents for Spouse-Minor Son-Minor Daughter Relation Set[a]

	Percent to Spouse				
Title Property	100%	51%–99%	50%	0%–49%	Row *N*
All separate	48.5	5.0	29.7	16.9	101
Mixed separate and joint	59.0	9.4	21.8	9.9	234
All joint	62.2	5.8	23.3	8.8	378
Column *N*	422	49	169	73	713

$\chi^2 = 13.0$; $df = 6$; $p = .05$.
[a]19 missing cases; title ownership to automobile excluded from analysis.

decedent's estate, assumes that a wealthier decedent is more likely to want to distribute a portion of the intestate estate to the children.[137] The Sussman study, which provides an evidentiary basis for this assumption,[138] is not supported by the present study. As shown in tables 16 and 17, the relationship between indicators of wealth and the proportion left to the spouse was statistically insignificant. In addition, no consequential consistent changes are observed in the distributive patterns when respondents were asked to reconsider their allocative preferences under altered wealth situations (see appendix table A7). These findings help to establish the stability and reliability of the results

TABLE 16

Percentage of Estate to Spouse by Family Income for Currently Married Respondents for Spouse-Minor Son-Minor Daughter Relation Set

	Percent to Spouse				
Family Income	100%	51%–99%	50%	0%–49%	Row *N*
Under $8,000	53.2	7.3	22.6	16.9	124
$8,000–$13,999	56.4	4.7	27.5	11.4	211
$14,000–$19,999	56.6	9.3	25.8	8.2	182
$20,000–$24,999	66.7	5.6	20.4	7.4	108
$25,000 and over	67.3	8.4	16.8	7.5	107
Column *N*	432	51	173	76	732

$\chi^2 = 19.3$; $df = 12$; $p = .08$.

137. Cf. note 115 *supra* and accompanying text. In the context of a spouse-children situation, commentators frequently suggest possible tax savings. By distributing a portion of a substantial intestate estate to the children instead of the surviving spouse, the UPC provides for federal estate tax savings upon the death of the spouse. See Mulder, *supra* note 15, at 313–18; Wellman, *supra* note 16, at 204. The Tax Reform Act of 1976 eliminates this tax savings argument. The increased availability of the marital deduction (50 percent of the adjusted gross estate or $250,000, whichever is greater), I.R.C. § 2056, as well as the unified credit, which essentially permits the first $175,625 in an estate to be free of estate tax, I.R.C. § 2010, effectively eliminates federal estate tax as a consideration in the design of intestate succession statutes.

138. Sussman, *supra* note 15, at 89–90.

found in table 17. Thus, once again, the fixed dollar distributive pattern does not appear to represent the wishes of wealthy decedents.

In summary, a majority of the respondents want to leave their entire estates to their spouses. The findings obtained in this study combined with prior will studies indicate that most citizens prefer distribution of

TABLE 17
Percentage of Estate to Spouse by Actual Estate Size for Currently Married Respondents for Spouse-Minor Son-Minor Daughter Relation Set[a]

	Percent to Spouse				
Estate Size	100%	51%–99%	50%	0%–49%	Row *N*
$0–$12,999	50.0	8.8	26.5	14.7	68
$13,000–$25,999	57.5	5.7	21.7	15.1	106
$26,000–$49,999	58.9	8.5	21.7	10.9	129
$50,000–$99,999	61.4	5.3	24.4	8.9	246
$100,000 and over	60.4	8.2	23.6	7.6	182
Column *N*	432	51	172	76	731

$\chi^2 = 9.7$; $df = 12$; $p = .65$.
[a] 1 missing case.

the entire estate to the spouse and are in favor of the recent legislative changes so providing. The tendency found in will studies for a greater proportion of testators to give the surviving spouse the entire estate as compared with the findings for the sample participants in this study may be best explained by the fact that the respondents in this study did not have the benefit of legal advice. The significant differences in the distributive portions for persons residing in different states is surprising and difficult to explain. Nonetheless, distribution of the entire estate to the spouse was the dominant distributive pattern in all the states surveyed. Therefore, adoption of this distributive pattern in all state intestate succession statutes seems appropriate. The findings do not support the recently adopted statutory patterns that provide a share to children after a fixed dollar amount is distributed to the spouse. A statute that permits the spouse, who is also the natural or adoptive parent of the children, to inherit the entire estate in preference to the children has the added advantages of simplifying property titles, simplifying intestate succession statutes, and avoiding guardian administration for property going to minors.

b) Distribution between spouse and children when the spouse is not the natural or adoptive parent □□ If a decedent dies survived by children from a prior marriage and the spouse of a current marriage, the appropriate distribution of the estate between spouse and children becomes uncertain. Remarriage creates a variety of complex familial situations, and neither the interests of the spouse nor the children can

be generalized. A second marriage late in life after the children are adults creates different problems from those faced when the second marriage occurs when the children are still young and an opportunity still exists for a parental relationship to develop between the stepparent and children. The parent-child relationship is even more likely to develop if the children are brought into the household. These two situations become more complicated if the second spouse has children from a previous union or if there are children from the second marriage.

Usually if a statute provides the surviving spouse who is the natural or adoptive parent of the decedent's children with 50 percent or less of the decedent's estate, the statute contains no specific provision for multiple marriages.[139] Special provisions for multiple marriages have been enacted in states that provide to a surviving spouse who is the natural or adoptive parent of the decedent's children a major portion of the intestate's estate.[140] The amount going to the spouse is reduced apparently because of the greater risk that the decedent's children will be disinherited.[141] Except for Ohio, the multiple marriage provision applies if the spouse is not the natural or adoptive parent of one or more children of the decedent. In Ohio, the spouse's share is reduced only if the spouse is not the natural or adoptive parent of any of the decedent's children.[142]

Very little empirical data is available with respect to multiple marriage situations. Findings in the Sussman study provided the best information to date, although the number of multiple marriage cases is too small to make reliable generalizations. Of 28 remarried decedents, 57

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139. Exceptions to this general rule include: Ind. Code § 29-1-2-1(b) (1976); La. Civ. Code Ann. art. 916 (West Cum. Supp. 1978); Okla. Stat. Ann. tit. 84, § 213 (First) (1971); Vt. Stat. Ann. tit. 14, § 465 (1974).

140. Alaska Stat. § 13.11.010(3) (1972); Ariz. Rev. Stat. § 14-2102(2) (1975); Colo. Rev. Stat. § 15-11-102(1)(c) (1973); Conn. Gen. Stat. Ann. § 46-12 (West 1978); Del. Code tit. 12, § 502(4) (Cum. Supp. 1977); Fla. Stat. Ann. § 732.102(1)(c) (West 1976); Idaho Code § 15-2-102(a)(4) (Cum. Supp. 1977); 1974 Mont. Laws ch. 365, § 1, at 1387 (to be codified as Mont. Rev. Codes Ann. § 91A-2-102(2)(A)-(B)). Neb. Rev. Stat. § 30-2302(4) (1975); N.H. Rev. Stat. Ann. § 561:1(I)(d) (1974); N.J. Rev. Stat. § 3A:2A-34(d) (Cum. Supp. 1978-79) (effective Aug. 29, 1979); N.D. Cent. Code § 30.1-04-02(4) (1976); Ohio Rev. Code Ann. § 2105.06(B)-(C) (Page 1976); Decedents, Estates and Fiduciaries, Pub. Act No. 23, § 1, 1978 Purdon's Legis. Serv. 33 (West) (to be codified as 20 Pa. Cons. Stat. Ann. § 2102(4) (Purdon)); Utah Uniform Prob. Code § 75-2-102(1)(d) (1977); Wis. Stat. Ann. § 852.01(1)(a)(3) (West 1971).

141. See Curry, *supra* note 18, at 118; W. Garrett Flickinger, Intestate Succession and Wills Law: The New Probate Code, 6 N.M.L. Rev. 25, 28 (1975); O'Connell & Effland, *supra* note 18, at 211-12.

142. "If there is a spouse and more than one child or their lineal descendants surviving, the first thirty thousand dollars, if the spouse is the natural or adoptive parent of one of the children, or the first ten thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus...." Ohio Rev. Code Ann. § 2105.06(C) (Page 1976). See Note, Ohio's 1975 Probate Reform Act: Analysis of Major Changes in Ohio's Probate Code, 45 U. Cin. L. Rev. 429, 430-31 (1976).

percent willed their entire estates to their spouses. Findings indicated that the larger the estate and the shorter the marriage, the less likely that the spouse would receive the entire estate.[143] Findings also indicated that if the previous marriage had been dissolved by divorce rather than by death, the surviving spouse received a greater share of the estate.[144] In those cases the decedent testator was often alienated and isolated from the children of the prior marriage.

To obtain further information with respect to these complex familial situations, respondents were asked the following question:

> How would you like your property distributed if you are survived only by your (wife/husband) and a minor child of your previous marriage who lives with your former spouse?

This hypothetical, involving a divorce and possible isolation from the child of the prior marriage, presented a situation that according to the Sussman study, might lead respondents to favor the surviving spouse. The child's isolation, however, suggests that the surviving spouse is unlikely to provide for the child at his or her death. Table 18 describes

TABLE 18

Distribution of Estate Between Spouse and Child of a Prior Marriage (Percent)[a]

Distribution Pattern by Percent of Estate to:			
Spouse	Child of Prior Marriage	Percent of Respondents in Pattern	*N*
100	0	23.0	171
51–99	1–49	28.9	215
50	50	37.2	277
0–49	51–99	11.0	82
Total		100.1	745

[a] 5 missing cases.

the results. Substantially fewer respondents gave the entire estate to the current spouse in this relation set than in the spouse-children relation sets previously considered (see tables 11 and 12 above). Yet, more than 51 percent of the respondents gave over half the estate to the spouse.[145]

Contrary to the Sussman study, the wealth of a respondent was not a significant factor (see appendix tables A8 and A9). Moreover, when

143. Sussman, *supra* note 15, at 91–95. See also *id.* at 128–31 for a description of intestate distribution that involved remarriage.

144. *Id.* at 93–94.

145. Accord, Illinois study, *supra* note 29, at 728–32.

respondents were asked to reconsider this question assuming an estate different in size from their own, a dramatic increase in the proportion of the estate given to the spouse occurred (see appendix table A10). Regardless of whether the hypothetical estate was larger or smaller than the respondents' actual estate, the share of the estate going to the spouse increased. These results seem to suggest that the respondents were concerned primarily for the spouse. Apparently when respondents assumed smaller estates than they actually owned, their concern for their spouses' financial security directed them to leave a bigger portion of their estates to the spouses. On the other hand, when respondents were confronted with larger estates than they actually owned, apparently their feelings of generosity also led them to leave a bigger portion of their estates to their spouses. Thus, a summary interpretation of these findings is that citizens feel primary but not exclusive responsibility to the spouse even when a child of a prior marriage also survives.

From findings from other questions in the survey, it is reasonable to assume that respondents would prefer that an adult child receive a greater share of the estate than table 18 shows going to the minor child of a prior marriage.[146] Also if there were children by the present spouse as well as children by a prior spouse, respondents would prefer that all children be treated equally.[147]

A statute that provides a second or subsequent spouse with 60 to 70 percent of the decedent's estate with the residue being shared equally by the decedent's children or their issue would mirror most intestate decedent's preferences and best accommodate societal needs. By this distributive pattern, self-sufficiency of the spouse can be assured. An adult child is unlikely to be financially dependent upon the decedent, and a minor child within or without the household may be able to turn to a surviving natural parent for support. Thus from a financial dependency view, the children have less claim to the estate. If the minor child has no surviving parent, a better case is made for providing a greater share of the estate to the child. Perhaps a special rule in the intestate succession statute is warranted for such situations. Neither the suggested distributive pattern nor any other pattern could hope to address all the various remarriage situations. Most especially, it probably does not accommodate the preferences of persons who have entered into companionship marriages late in life. As in the case of persons who die without a spouse and issue, however, states should strive to provide

146. See tables 11 and 12 *supra* and note 132 *supra* and accompanying text.
147. See table 19 and accompanying text *infra*.

the most predictable distributive pattern. From findings available in this study and the Sussman study, the suggested intestate succession pattern best meets that goal.

4. Distribution Among Issue

Issue are a favored class in all American intestate succession statutes.[148] The succession laws require issue to share the intestate decedent's estate with the surviving spouse,[149] but no statute requires the decedent's issue to share the estate with any ascendants or collateral relatives. This preferential treatment corresponds to demonstrated preferences of testators.[150] Within the class of claimants called issue, several generally accepted principles of law have developed to determine who shall share in the estate and how much each person shall receive.

a) Equality among children □□ First, all states provide that if the decedent is survived by two or more lawful children, they will receive equal shares regardless of sex, age, or parents' divorce. Prior will studies indicate that deviation from this rule of equality arises frequently in wills. Dunham found that when the deceased was survived by children only, 24 of the 35 wills (69 percent) deviated from the distribution pattern found in the intestate succession statutes.[151] The most common deviation found in these estates was inequality of treatment among the children.[152] Substantially fewer deviations from the intestacy law occurred in cases investigated by Sussman. Of the 102 decedent testators survived only by children, 56 percent treated the children equally.[153] In those cases where the children were treated unequally, a common pattern was to give a greater share of the estate to the child who cared for the parent in old age.[154] Adult children were the closest kin of 106 survivor testators. Of the testators in this survivor group, 91 percent treated the children equally.[155] The substantial increase in the incidence of equality in the survivor group can be explained by the fact that fewer of these testators had reached an age when they required special care and had, as yet, not considered whether such services by one or more children should be specially rewarded.[156] When only minor

148. See William H. Page, Descent Per Stirpes and Per Capita, 1946 Wis. L. Rev. 3, 11–12, 23–27, 36–37, for a description of the historical development of the law.

149. See notes 128–29 *supra*.

150. Sussman, *supra* note 15, at 96–102; Browder, *supra* note 42, at 1305, 1307; Dunham, *supra* note 15, at 253–54.

151. Dunham, *supra* note 15, at 253–54.

152. *Id.*

153. Sussman, *supra* note 15, at 96–98.

154. *Id.* at 98–100. See also *id.* at 123–24 (3 cases of redistribution of testate estate permitting the child who cared for the parent to receive a greater share).

155. *Id.* at 101.

156. See *id.*

children were involved, all 27 survivor testators treated the children equally.[157] When the survivor testator had both minor and adult children, 17 of the 21 testators treated all children equally; 3 favored the minor children; and 1 favored an adult child.[158]

The respondents in this study agreed with the rule of equality of treatment of children.[159] The authors tested the principle as to sex and age in the hypotheticals that also included a spouse as a survivor. In those cases where the respondent did not give the spouse 100 percent of the estate, all but one treated the minor son and minor daughter equally (see table 11 above). When the hypothetical included a minor child and an adult child, of the 361 people who did not give 100 percent of the estate to the spouse, 258, or 71.5 percent, treated the children equally (see table 12 above). Of the remaining 103 respondents, about half preferred the adult child and about half preferred the minor child.[160]

Very little data are available concerning children from two marriages.[161] To determine whether persons without wills would also prefer that these children be treated equally, the following hypothetical was posed:

> How would you like your property distributed if you are survived only by a minor child from your present marriage and a minor child from your previous marriage who lives with your former (wife/husband)?

Table 19 describes the respondents' preferences. Most respondents

TABLE 19

Percentage of Estate to Child of Present Marriage in Minor Child of Present Marriage–Minor Child of Former Marriage Relation Set[a]

Percent of Estate to Child of Present Marriage	Percent of Respondents in Pattern	*N*
100	6.8	51
51–99	13.2	99
50	78.5	587
0–49	1.5	11
Total	100.0	748

[a] 2 missing cases.

157. *Id.* at 97.
158. *Id.*
159. Accord, Illinois study, *supra* note 29, at 736–37.
160. See text following note 132 *supra.*
161. See Sussman, *supra* note 15, at 97 (one case involved this situation); Illinois study, *supra* note 29, at 736–37 (87.8 percent of the respondents treated children equally).

treated the children equally. When respondents were asked to distribute a larger estate than the one they actually owned between a child of their present marriage and a child of a prior marriage, the respondents continued to treat the children equally. Similar results were obtained from those respondents asked to distribute an estate smaller than the one they actually owned (see appendix table A11). In sum, equality of treatment among children is generally accepted and preferred, regardless of sex, age, or previous marriage. To the extent the findings obtained in the Dunham and Sussman studies are inconsistent, they should be disregarded. Equality of treatment among all the decedent's children should be the distributive pattern adopted in the statute because it is the most predictable distributive pattern. Those individuals who, because of special circumstances, desire another distributive pattern must execute a will to accomplish it.

The one exception to the principle of equal treatment of children found in many intestate succession statutes concerns nonmarital (illegitimate)[162] children of the decedent. At common law the nonmarital child, being a stranger in blood, inherited from no one.[163] In the United States, however, all jurisdictions grant by statute some inheritance rights to the nonmarital child.[164] Because of the ease of determining maternity, the intestate succession statutes in all states except Louisiana[165] merely specify that a nonmarital child may share in the mother's estate along with those children born in marriage.[166] States have not been consistent in the statutory rules for allowing the nonmarital child to inherit from the father.[167] Some intestate succession statutes have provided that the nonmarital child could inherit only if the father marries the child's natural mother and acknowledges or recognizes the child.[168] This rule, in essence, required that the non-

162. Term applied in Krause, *supra* note 126, § 13.1, at 128.

163. Wilfrid Hooper, The Law of Illegitimacy 25–27 (London: Sweet & Maxwell, Ltd., 1911). Furthermore, the nonmarital child could not be legitimated by any subsequent act of the parents, such as intermarriage after birth. Note, Illegitimacy, 26 Brooklyn L. Rev. 45, 46 (1959).

164. See Note, *supra* note 163, at 74–79.

165. For a summary of the Louisiana scheme, see Illegitimates and Equal Protection, 10 U. Mich. J.L. Ref. 543, 550 n.49 (1977).

166. See, e.g., Ala. Code § 43-3-7 (1975); Cal. Prob. Code § 225 (West Cum. Supp. 1978); Cal. Civ. Code § 7003(1) (West 1956); Mass. Ann. Laws ch. 190, § 5 (Michie/Law. Co-op 1969); Ohio Rev. Code Ann. § 2105.17 (Page 1976); Tex. Prob. Code Ann. § 42(a) (Vernon Cum. Supp. 1978).

167. See Note, Inheritance Rights of Illegitimate Children Under the Equal Protection Clause, 54 Minn. L. Rev. 1336, 1337–38 (1970).

168. See, e.g., Ark. Stat. Ann. § 61-141(b) (1971); D.C. Code § 19-318 (1973); Ky. Rev. Stat. § 391.090(3) (1972); Mass. Ann. Laws ch. 190, § 7 (Michie/Law. Co-op 1969) (marriage in addition to either acknowledgment or adjudication of paternity); Miss. Code Ann. § 91-1-15 (1972).

marital child be legitimated, thus focusing on the status of the child.[169] In *Trimble v. Gordon*[170] the Supreme Court held this type of statute to be an unconstitutional denial of equal protection.[171] The Court recognized the problems of establishing paternity and agreed that the states could require a more demanding standard of proof for nonmarital children claiming under their fathers' estates than under their mothers' estates or for legitimate children generally, but the statute must be more carefully tailored than the one at issue.[172] The Court suggests that statutes allowing inheritance upon prior adjudication of paternity or formal acknowledgment of paternity would be permissible.[173] Thus, the right of the nonmarital child to inherit from the father, which was once largely a status question, has essentially developed into a proof of parentage question.[174] Most states have already adopted statutes of this kind[175] and are unaffected by the *Trimble* decision. One of the arguments presented to the Supreme Court in support of the statute was that it mirrors the presumed intentions of the

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169. Under such a statute, a nonmarital child who was not legitimated could not inherit from his father, even though paternity was satisfactorily shown. Moore v. Terry, 220 Ala. 47, 124 So. 80 (1929).

170. 430 U.S. 762 (1977).

171. See John E. Nowak, Ronald D. Rotunda, & J. Nelson Young, Handbook on Constitutional Law 606-7 (St. Paul: West Publishing Co., 1978) for discussion of this case.

172. Trimble v. Gordon, 430 U.S. at 772 n.14.

173. *Id.* The Court will have another opportunity to consider which type of statutes designed to establish paternity are constitutionally permissible in Lalli v. Lalli, 43 N.Y.2d 65, 371 N.E.2d 481 (1977), *cert. granted*, 46 U.S.L.W. 3578 (No. 77-115). The New York Court of Appeals upheld the constitutionality of a statute that requires as proof of paternity a judicial determination made during the lifetime of the father.

174. See Note, Recognizing the Father-Illegitimate Child Relationship for Intestate Succession—*Trimble v. Gordon*, 27 DePaul L. Rev. 175, 188 (1977).

175. Most states that permit the nonmarital child to inherit from the father upon prior adjudication of or formal acknowledgment of paternity have established various combinations of alternative requirements for inheritance. E.g., Iowa Code Ann. §§ 595.19, 633.222 (West 1964) (prior proof of paternity; written, or general and notorious recognition, or legitimation by marriage); Kan. Stat. § 59-501 (1976) (notorious or written recognition, or prior adjudication of paternity); N.M. Stat. Ann. § 32A-2-109(B) (Supp. 1976) (marriage, written recognition plus general and notorious recognition, prior adjudication of paternity, or establishment of paternity after death).

The UPC allows the nonmarital child to inherit from the father if the father-child relationship is established under the Uniform Parentage Act [hereinafter cited as UPA]. UPC § 2-109 (alternative subsection (2)). The UPA provides for substantive legal equality for all children regardless of the marital status of their parents. To identify the father, the UPA establishes several rebuttable presumptions to cover instances in which proof of external circumstances indicate a particular man to be the probable father. The UPA also provides for the ascertainment of paternity through court action, whether or not external circumstances presumptively point to a particular man as the father. See Commissioners' Prefatory Note, Uniform Parentage Act (1973). Alternatively, for states that have not adopted the UPA, the UPC, UPC § 2-109 (alternative subsection (2)), allows the nonmarital child to inherit from the father if the father marries the child's natural mother, upon a prior adjudication of paternity, or if paternity is established after the father's death.

citizens; i.e., unless there was acknowledgment of the child in addition to marriage to the natural mother, a father would prefer that his nonmarital child not share in the estate.[176] The Court did not reach this issue because it found that the statute was not designed with the purpose of conforming to the presumed intent of citizens of the state with respect to nonmarital children.[177] The Court went on to indicate that the theory of presumed intent would not be sufficient to justify the disinheritance of nonmarital children in this manner.[178] In fact, empirical evidence demonstrates that these statutes do not conform to citizen preferences. The findings in prior studies indicate that the public favors allowing nonmarital children to inherit once paternity is ascertained.[179] Similar findings were obtained when the authors posed the following hypothetical to respondents:

> How would you like your property distributed if you are survived only by a minor child from your present marriage and your minor illegitimate child?

The respondents' preferences are described in table 20.

TABLE 20

Percentage of Estate to Legitimate Child in Minor Legitimate Child–Minor Nonmarital Child Relation Set[a]

Percent of Estate to Legitimate Child	Percent of Respondents in Pattern	*N*
100	15.9	118
51–99	7.7	57
50	75.9	565
0–49	.5	4
Total	100.0	744

[a] 6 missing cases.

176. Trimble v. Gordon, 430 U.S. at 774.

177. *Id.* at 775.

178. *Id.* at 775 n.16.

179. The following question was posed to Illinois residents in a telephone interview:

Which one of these statements best reflects your opinion?

a) Unless the father leaves a will in which he specifically gives his illegitimate child an inheritance, the illegitimate child should have no right to inherit from its father.

b) If the father does not leave a will, the illegitimate child should inherit from its father the same inheritance to which the child would be entitled if it were of legitimate birth.

c) If the father does not leave a will, the illegitimate child should inherit from its father enough to cover support needs until the child is able to go to work and earn its own living.

Harry D. Krause, Illegitimacy: Law and Social Policy 318 (Indianapolis, Bobbs-Merrill Co., 1971). Of the respondents, 64 percent chose (*b*), and 31 percent chose (*c*). In another study conducted in Illinois respondents were asked the following question: "What percentage of your estate would you wish to give each survivor if you were survived only by a minor child from your present marriage and your minor illegitimate child?" Almost 93 percent wanted each child to receive 50 percent of the estate. Illinois study, *supra* note 29, at 736–37.

The data obtained from this study, as well as from prior studies, demonstrate that public opinion supports the constitutionally mandated rule that for inheritance purposes the law should treat legitimate and nonmarital children equally.

b) Remote descendants do not compete with their ancestors □□ A second well-recognized principle of intestate succession is that remote descendants do not compete with their living ancestors who are also lineal descendants of the decedent.[180] For example, no intestate statute allows a decedent's grandchild to receive any share of the decedent's estate if the decedent's child, the grandchild's parent, is living. If one of the decedent's children predeceased the decedent, the child of that deceased child would succeed to an interest in the estate. This result is in accordance with the theory of representation that is adopted by all intestate succession statutes. Lineal descendants are always allowed to share in the estate as long as they survive the intestate decedent and have no living ancestors.[181]

The rule that a living ancestor excludes his lineal descendants makes good sense from a public policy viewpoint. It reduces the number of claimants to property and thereby eliminates excessive subdivision of property and complicated property titles. In addition, it reduces the likelihood that minors will be recipients of property and the concomitant administrative difficulties of appointing a guardian of the estate. The arguments made in the previous section in support of a statutory estate plan that distributes the estate to the surviving spouse-parent rather than to the decedent's minor children apply here also.[182] If the parent (child of decedent) of the grandchild is living, that parent should receive the property. That parent will use it for the benefit of the grandchildren and provide for the grandchildren at death.[183]

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180. Page, *supra* note 148, at 12.

181. See *id.* at 413–14.

182. See notes 121–28 *supra* and accompanying text.

183. Distribution of the estate to grandchildren may be advisable for relatively wealthy decedents and their children. Any property received by the child-parent is likely to be used for the benefit of the grandchildren. If part of the decedent's estate is distributed to grandchildren rather than to children, the distribution indirectly assists the children but allows them to avoid income and death taxes as well as administration costs at their death. The wealthier the testator and the child, the greater the savings available to the children from this distribution pattern. This rationale for distributing part of the estate to the grandchildren should not affect the design of an intestate succession statute. It applies only to wealthy decedents, who are not likely to die intestate. Moreover, to accomplish the distribution properly, individualized planning by the decedent and lawyer is required. For example, a trust for the grandchildren should be established so that guardian administration can be avoided and provision for the special needs of the grandchildren can be obtained.

The argument made in the text suggests that sons- and daughters-in-law should receive the property if the decedent's child predeceased the decedent leaving spouse and issue. To date, no evidence as to decedent's preference for such a distributive pattern has been obtained. Cf. Illinois study, *supra* note 29, at 742–43; Mulder, *supra* note 15, at 321–22.

According to the will studies, however, a typical deviation from intestacy statutes found in wills is the inclusion of grandchildren in the distributive provisions.[184] The following hypothetical was presented to respondents to determine whether they agreed with the rule of law that precludes inheritance by issue of living ancestors.

> How would you like your property distributed if you are survived only by an adult son, the minor child of the son, and the minor child of another son who has already died?

The results are given in table 21.

TABLE 21

Distribution of Estate Among Son, Living Son's Child, and Deceased Son's Child (Percent)[a]

Distribution Pattern by Percent of Estate to:				
Son	Living Son's Child	Deceased Son's Child	Percent of Respondents in Pattern	*N*
100	0	0	21.9	164
50	0	50	16.3	122
50	25	25	20.3	152
33	33	33	17.9	134
25	25	50	5.6	42
0	50	50	7.2	54
Other[b]			10.8	81
Total			100.0	749

[a]1 missing case.

[b]One respondent gave the child of a deceased son nothing but gave the child of the living son a share of the estate. The distribution was 75 percent of the estate to the living son and 25 percent to that son's child. The deceased son's child received the entire estate in 6 cases.

Only 16.3 percent of the respondents favored the distribution provided in the intestacy statutes (50 percent to son and 50 percent to deceased son's child). When those respondents who gave the living son the entire estate are excluded, it was found that 362 respondents, or 61.9 percent of the remaining sample (585 cases), treated the grandchildren equally. Also important to realize, however, is that of the 585 respondents who did not give the entire estate to the living son, 46.8 percent gave the living son at least 50 percent of the estate. In sum, contrary to intestate succession statutes, the living son was a preferred claimant to the estate, but the deceased son's child was not. If one grandchild shared, the tendency was that both grandchildren shared equally.[185] The authors hypothesized that wealthier respondents favored

184. Sussman, *supra* note 15, at 97-98, 102-3; Dunham, *supra* note 15, at 254.

185. These findings are not necessarily contrary to the results obtained in the Illinois study in which 55 percent of the respondents in the Illinois sample gave 100 percent of the estate to the child when asked, "What percentage of your estate would you wish to give each survivor if you

a pattern of distribution that includes grandchildren regardless of whether the parent is alive and, therefore, analyzed the distributive patterns by actual estate size. Table 22, which gives the percent mean

TABLE 22

Percentage of Mean Award to Son, Living Son's Child, and Deceased Son's Child by Actual Estate Size[a]

Estate Size	*Percent Mean Award to:* Son	Living Son's Child	Deceased Son's Child	*N*
$0–$12,999	51.5	20.9	27.1	73
$13,000–$25,999	58.3	16.1	25.2	109
$26,000–$49,999	54.8	17.0	27.7	128
$50,000–$99,999	50.4	17.3	32.0	248
$100,000 and over	49.7	17.4	32.5	183
All cases	52.3	17.4	29.9	741
F test	1.60	0.85	0.23	
Significance	0.16	0.52	0.88	

[a]9 missing cases.

award to each claimant, establishes that estate size had no effect on the distributive preferences of the respondents.[186] In addition, no consequential changes are observed in the distributive patterns when respondents were asked to reconsider their allocative preferences under altered

were survived only by an adult child and his child, that is, your grandchild?" Illinois study, *supra* note 29, at 738. When these same respondents were asked "What percentage of your estate would you wish to give to each survivor if you were survived by an adult child and a grandchild who was the offspring of a deceased child?" 18.4 percent gave no part of the estate to the grandchild. *Id.* at 739. Thus, the conflicting results in the two surveys can be explained by the substantial minority of respondents in the Illinois survey who distributed the entire estate to the living son and disinherited the deceased son's family. The 55 percent of the respondents favoring the adult child rather than his or her child apparently included respondents who favor children to grandchildren, regardless of whether or not their parent is alive. When the two questions asked in the Illinois study were combined in this questionnaire into one hypothetical, the citizen preferences were clarified.

186. Persons with smaller estates tended to treat the grandchildren equally more frequently than persons with larger estates, as indicated in the following tabulation:

Treatment of Grandchildren by Estate Size for Currently Married Respondents When One or Both Grandchildren Receive a Portion of the Estate

Estate Size	*Nature of Treatment (Percent)* Equal	Not Equal	Row *N*
$0–$12,999	77.1	22.9	48
$13,000–$25,999	68.8	31.2	77
$26,000–$49,999	69.1	30.9	97
$50,000–$99,999	57.3	42.7	199
$100,000 and over	55.8	44.2	147
Column *N*	353	215	568

$\chi^2 = 12.5$; $df = 4$; $p = .01$.

wealth situations (see appendix table A12). These findings help establish the stability and reliability of the preferred distributive patterns in tables 21 and 22.

The results obtained are contrary to basic principles adopted in all intestate succession statutes. The difficult question is whether the demonstrated wishes of the decedent should override the public policy arguments against a statutory plan that distributes part of the decedent's estate to grandchildren who have a living parent who is the child of the decedent. Of all the findings obtained in prior studies and in this study, this is the one instance when public policy and probable dispository wishes of intestate decedents most clearly diverge. Despite complications in title to property and administrative problems when minors receive shares of intestate estates, the respondents preferred to have grandchildren share in their estates along with their children. Further study is needed in this area before intestate succession statutes are changed. Perhaps if persons were advised of the complications that arise from distributing a portion of the estate to grandchildren, their judgment on this matter would change. In addition, further investigation of the citizenry's reasons for granting grandchildren rights of inheritance may be helpful. Even if further study provides clear evidence that intestate decedents would prefer grandchildren to inherit with their children or instead of their children, the intestacy statutes should not be amended. There may be good estate planning reasons for bequeathing property to grandchildren. An essential ingredient of the plan, however, is provision for the special problems that arise when the grandchildren are minors.[187] The intestate succession statute cannot and should not contain such complexities.

c) Proportion of decedent's estate distributed to each of the decedent's issue □□ The above-stated principles of intestate succession with regard to issue indicate which persons are entitled to inherit. This is the initial step in applying the representation theory. The second step in the representation theory determines the portion of the estate that is to go to each person who is entitled to share in the estate of the decedent. Unlike the other rules delineated, the proper system for determining the portion each designated taker should receive is not settled.[188]

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187. See note 183 *supra*.

188. See Edward W. Bailey, Intestacy in Texas: Some Doubts and Queries, 32 Tex. L. Rev. 497, 506-20 (1954); Chaffin, *supra* note 53, at 503-6; Charles A. Heckman, The Treatment of Some Traditional Problems of Intestate Succession in the North Dakota Century Code, 45 N.D.L. Rev. 465, 465-75 (1969); Denny O. Ingram, Jr., & Theodore Parnall, The Perils of Intestate Succession in New Mexico and Related Will Problems, 7 Nat. Resources J. 555, 570-82 (1967); Page, *supra* note 148, at 3-8, 27-39; Herbert E. Ritchie, Methods of Intestate Succession, 14 U. Cin. L. Rev. 508, 513-23 (1940); Lawrence W. Waggoner, A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626 (1971); Comment, Inheritance by Grandchildren in Their Own Rights and by Representation, 10 Tul. L. Rev. 613, 617-19 (1936). See also Atkinson, *supra* note 81.

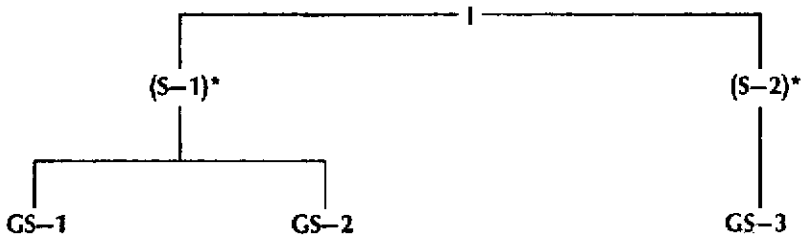
Analysis of the various methods found in the intestacy statutes for determining shares indicates that two basic questions are involved. The first question concerns the generation at which the initial division of the estate should occur. Under the per stirpes system, the initial division of the estate is made at the generation nearest to the decedent, i.e., the children generation. The number of primary shares in the estate is determined by adding together the number of living members in the children generation and the number of deceased members in that generation who have left issue. Obviously this system continues the principle of equality among children to its logical extreme—whether alive or dead, the children or the family of the children shall be treated equally. Under the per capita system, the initial division of the estate is made at the generation nearest to the decedent having living members. The number of primary shares is then determined in the same manner as under the per stirpes system.[189] In California, if all eligible takers are

189. Classifying the statutes according to whether they adopt the per stirpes or per capita system for determining primary shares is often difficult because of the ambiguous language found in the statutes and the paucity of cases construing such language. The per stirpes system appears to have been adopted by 17 jurisdictions. Ala. Code §§ 43-3-1(1), -2 (1975); Conn. Gen. Stat. Ann. § 45-274 (West 1960) (see Daniels v. Daniels, 115 Conn. 239, 161 A.94 (1932); Cook v. Catlin, 25 Conn. 387 (1856); D.C. Code § 19-307 (1973) (see McManus v. Lynch, 28 App. D.C. 281 (1906); Iglehart v. Holt, 12 App. D.C. 68 (1898)); Fla. Stat. Ann. § 732.104 (West 1976) (see *In re* Estate of Davol, 100 So. 2d 188 (Fla. Ct. App. 1958)), in which the court held the earlier case of Broward v. Broward, 96 Fla. 131, 117 So. 691 (1928), which interpreted different language as requiring the per capita system, not determinative for purposes of interpreting existing statutory language); Ga. Code Ann. § 113-903(4) (1975); Ill. Rev. Stat. ch. 110½, § 2-1(a)-(b) (1977) (see Welch v. Wheelock, 242 Ill. 380, 90 N.E. 295 (1909)); Iowa Code Ann. § 633.21[9](1) (West 1964) (language of statute appears to require the per stirpes system for determining primary shares but no case on point; see Note, Intestate Succession Under the New Iowa Probate Code, 49 Iowa L. Rev. 753, 757–58 (1964)); Kan. Stat. § 59-506 (1976) (language of the statute appears to require per stirpes system for determining primary shares but no case on point; see Jay Scott Brown, Intestate Succession in Kansas, 8 Washburn L.J. 284, 288–91 (1969)); Ky. Rev. Stat. § 391.040 (1972); La. Civ. Code Ann. art. 895 (West 1952); Md. Est. & Trusts Code Ann. § 1-210(b) (1974); Minn. Stat. Ann. § 525.16(4)(a) (West 1975) (see Swenson v. Lewison, 135 Minn. 145, 160 N.W. 253 (1916); William L. Eagleton, The New Minnesota Probate Code, 20 Minn. L. Rev. 1, 12–14 (1935); R.I. Gen. Laws § 33-1-7 (1969); S.C. Code § 21-3-20(1) (1976); Utah Uniform Probate Code §§ 75-2-103(1)(a), -106 (1977) (language appears to provide for the per stirpes system for determining primary shares; however, the UPC Comment accompanies the statute, which suggests that the per capita system for determining primary shares was intended); Wyo. Stat. Ann. § 2-3-101(c)(i) (1977).

Delaware may also provide for the per stirpes system for determining primary shares. Prior to 1975, the Delaware statute provided that issue take "by right of representation" which was defined apparently to be the per stirpes system by the following provision: "Distribution among children... in equal degree, shall be in equal portions, but the issue of such of them as shall have died before the intestate shall take according to stocks, by right of representation and this rule shall hold, although the distribution be entirely among such issue." Del. Code § 1841 (1852) (*found in* Del. Code tit. 12, § 513 (1974)). A new statute, enacted in 1975, repealed the definitional section and replaced the term "by right of representation" with the term "per stirpes." 59 Del. Laws ch. 384, § 1 (1973). Presumably the per stirpes system for determining primary shares continues to be the law in Delaware. Del. Code tit. 12, § 503(1) (Cum. Supp. 1977). But see Chaffin, *supra* note 53, at 503 n.307, classifying Delaware as requiring the per capita system.

Mississippi may also provide for the per stirpes system for determining primary shares, but the ambiguous language found in the statute leaves the question open until clarification by the courts. Miss. Code Ann. § 91-1-3 (1972). See Chaffin, *supra* note 53, at 504 n.305; Comment, An Examination of Various Aspects of Intestate Succession in Mississippi, 37 Miss. L.J. 107, 110 (1965).

of the same generation, the per capita method for determining primary shares is used. If the eligible takers are of different generations, however, the per stirpes method for determining primary shares is applied.[190] The following diagrams demonstrate the differences between the per stirpes and per capita systems for determining primary shares (figs. 1 and 2). In figure 1, under the per stirpes method the estate



*Parentheses indicate lineal descendant predeceased the intestate.

Fig. 1

should be divided into two primary shares, whereas under the per capita method the estate should be divided into three primary shares. In California, which varies its method depending on whether all eligible takers are in the same generation, the per capita method would apply. In figure 2, again the per stirpes method fixes two primary shares whereas the per capita method fixes three primary shares. In California the per stirpes method would apply because the eligible takers are in different generations.

The second question that arises when analyzing representational systems concerns the manner of dividing the estate of the decedent after the number of primary shares is determined. Under a per stirpes system, primary shares are divided and redivided in the same manner as described for determining primary shares under the per stirpes system until all living descendants who have no living ancestors have received a share of the estate. Thus, each deceased ancestor is treated as if he or she were an intestate decedent when secondary, tertiary, and more remote shares are determined. Those states that have chosen the per stirpes system for determining primary shares have also chosen that system for representation through the more remote generations.[191] This method for determining the share of the estate each eligible descendant

190. Cal. Prob. Code §§ 221-222, 250 (West 1956), *as construed in* Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P.2d 111 (1945). The statutes in Nevada, Oklahoma, and South Dakota have language similar to the California statute; however, to date no case in these states has addressed the issue raised in *Maud*. See Nev. Rev. Stat. §§ 134.040, .140 (1973); Okla. Stat. Ann. tit. 84, § 213 (First) (1971); S.D. Compiled Laws Ann. §§ 29-1-5, -14 (1976).

191. See note 189 *supra*.

receives has been called "per stirpes,"[192] but a more accurate designation for this system is "per stirpes with per stirpes representation." About half the states that have chosen the per capita system for determining the primary shares have chosen the per stirpes representation system.[193] This hybrid system has been called both "per stirpes"[194] and

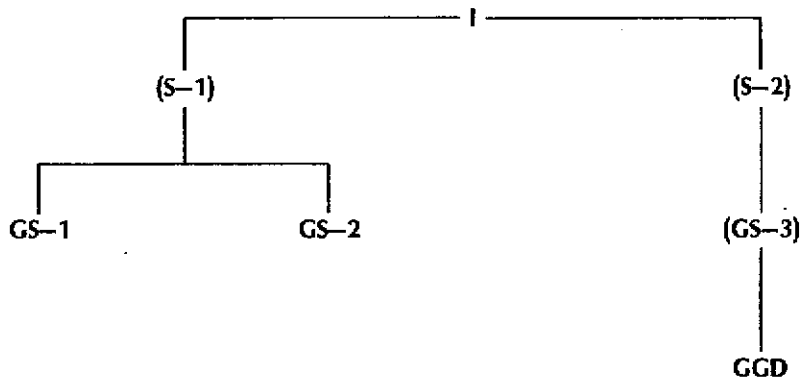


Fig. 2

192. See Ill. Rev. Stat. ch. 110½, § 2-1 (1977).

193. Again, classifying the statutes according to whether they adopt the per capita method for determining primary shares and the per stirpes or other methods of representation for determining the more remote shares is difficult because of the ambiguous language found in the statutes and the paucity of cases construing such language. The per capita with per stirpes representation system appears to have been adopted by the following jurisdictions. Me. Rev. Stat. tit. 18, §§ 851, 1001(2) (1964) (see Healey v. Cole, 95 Me. 272, 49 A. 1065 (1901)); Mass. Ann. Laws ch. 190, § 3(1) (Michie/Law. Co-op 1969) (see Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889)); Mich. Comp. Laws Ann. § 702.80 (First) (Cum. Supp. 1978-79) § 702.93(1)-(5) (1968) (see 1945-46 Op. Att'y Gen. 388); Mo. Ann. Stat. § 474.020 (Vernon 1956); N.H. Rev. Stat. Ann. § 561:1(II)(a) (1974) (see Preston v. Cole, 64 N.H. 459, 13 A. 788 (1888), which in dicta construed language to require per capita with per stirpes representation)); N.Y. Est., Powers & Trusts Law § 4-1.1(a)(1)-(2) (McKinney Cum. Supp. 1977-78) §§ 1-2.14, 4-1.1(a)(6), (b)-(c) (McKinney 1967) (see *In re* Estate of McKeon, 25 Misc. 2d 850, 199 N.Y.S.2d 158 (1960)); Ohio Rev. Code Ann. §§ 2105.06(A)-(C), .12-.13 (Page 1976) (see Snodgrass v. Bedell, 134 Ohio St. 311, 16 N.E.2d 463 (1938); 20 Pa. Cons. Stat. Ann. § 2104(1)-(2) (Purdon 1975) (see *In re* Minshall Estate, 36 Del. 329, 67 Pa. D & C 377 (1949)); Tex. Prob. Code Ann. § 43 (Vernon 1956); Va. Code § 64.1-3 (1973); Vt. Stat. Ann. tit. 14, § 551(1) (1974) (see *In re* Martin's Estate, 96 Vt. 455, 120 A. 862 (1923), which in dicta indicated statute requires per capita with per stirpes representation)); W. Va. Code § 42-1-3 (Cum. Supp. 1978).

Indiana, Tennessee, and Washington have statutes containing the following or very similar language: "If they are all of the same degree of kinship to the intestate, they shall take equally, or if unequal degree, then those of more remote degree shall take by representation." Ind. Code § 29-1-2-1(c)(1) (1976); Tenn. Code Ann. §§ 31-204(1), -205 (Supp. 1977); Wash. Rev. Code Ann. §§ 11.02.005(3), .04.015(2)(a) (Cum. Supp. 1976). No court has construed this language, but presumably it would be interpreted as per capita with per stirpes representation. See Chaffin, *supra* note 53, at 504 n.307.

As noted in note 190 *supra*, Nevada, Oklahoma, and South Dakota have language in their statutes similar to the language construed in Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P.2d 111 (1945), and, therefore, cannot be classified with certainty as per capita with per stirpes representation.

194. See *In re* Estate of McKeon, 25 Misc. 2d 850, 199 N.Y.S.2d 158 (1960); Kraemer v. Hook, 168 Ohio St. 221, 152 N.E.2d 430 (1958); Ohio Rev. Code Ann. §§ 2105.06(A)-(C), .12-.13 (Page 1976). See also Heckman, *supra* note 188, at 465-66; Ingram & Parnall, *supra* note 188, at 573-74; Page, *supra* note 148, at 7-8.

"per capita with representation."[195] A more accurate name for this hybrid system, however, is "per capita with per stirpes representation."[196] As is readily apparent, the only difference between the per stirpes with per stirpes representation system and per capita with per stirpes representation system is the definition of the root generation, i.e., that generation used to determine the number of primary shares. Thus, if the intestate decedent is survived by a child, the root generation is the children generation under both systems, and the shares of the decedent's estate going to the more remote lineal descendants will be the same under both systems.

Of the remaining states that have adopted the per capita system for determining primary shares, all but North Carolina have adopted a per capita system for determining remote shares.[197] Under the per capita system, the primary shares are divided and redivided in the same manner as described above for determining primary shares until all living ancestors have received a share of the estate. Thus, each deceased ancestor is treated as if he or she were the intestate decedent when secondary, tertiary, and more remote shares are determined just as under the per stirpes system. The difference, however, is that the deceased ancestor's share is divided and redivided only in those generations in which there are living persons. This system has been called "per capita with representation"[198] but a more accurate name for this system would seem to be "per capita with per capita representation." This is the system of representation adopted in the UPC[199] and was also the one promulgated by the Model Probate Code.[200]

Unique in the United States, North Carolina, which has chosen the per capita system for determining the primary shares, has adopted a system for determining the shares of more remote descendants that ignores family lines for all purposes.[201] Deceased ancestors are not treated

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195. See Bailey, *supra* note 188, at 519; William L. Eagleton, Introduction to the Intestacy Act and the Dower Rights Act, 20 Iowa L. Rev. 241, 244, 247–49 (1935).

196. See Waggoner, *supra* note 188, at 632–33.

197. Alaska Stat. §§ 13.11.015(1), .030 (1972); Ariz. Rev. Stat. §§ 14-2103(B), -2106 (1975); Ark. Stat. Ann. §§ 61-134, -149 (1971), § 61-135 (Cum. Supp. 1977); Colo. Rev. Stat. §§ 15-11-103(1)(a), -106 (1973); Haw. Rev. Stat. §§ 560:2-103(1), -106 (1976); Idaho Code §§ 15-2-103(a), -106 (Cum. Supp. 1977); 1974 Mont. Laws ch. 365, § 1, at 1387 (to be codified as Mont. Rev. Code Ann. §§ 91A-2-103(1), -106); Neb. Rev. Stat. §§ 30-2303(1), -2306 (1975); N.J. Rev. Stat. §§ 3A:2A-35(a), -38 (Cum. Supp. 1978–79) (effective Aug. 29, 1979); N.M. Stat. Ann. § 32A-2-103(A), -10 (Supp. 1976–77); N.D. Cent. Code §§ 30.1-04-03(1), -06 (1976); Or. Rev. Stat. §§ 112.045(1), .065 (1977); Wis. Stat. Ann. §§ 852.01(1)(b), .03(1) (West 1971).

198. Waggoner, *supra* note 188, at 630.

199. UPC § 2-106.

200. Model Probate Code § 22(b)–(c) (Ann Arbor: University of Michigan Law School, 1946).

201. N.C. Gen. Stat. §§ 29-15, -16 (1976). See Waggoner, *supra* note 188, at 630.

as if they were the intestate decedent. Instead, the part of the estate that has not been allocated to the living members in the root generation under the per capita system of determining primary shares passes to the next generation that contains living members and is similarly distributed treating all descendants with living ancestors as if they had predeceased the intestate decedent. The process is repeated until all eligible takers receive their portion of the estate. This system may be referred to as "per capita" but is more accurately termed "per capita at each generation."[202]

Figure 3 demonstrates the different results obtained under the per

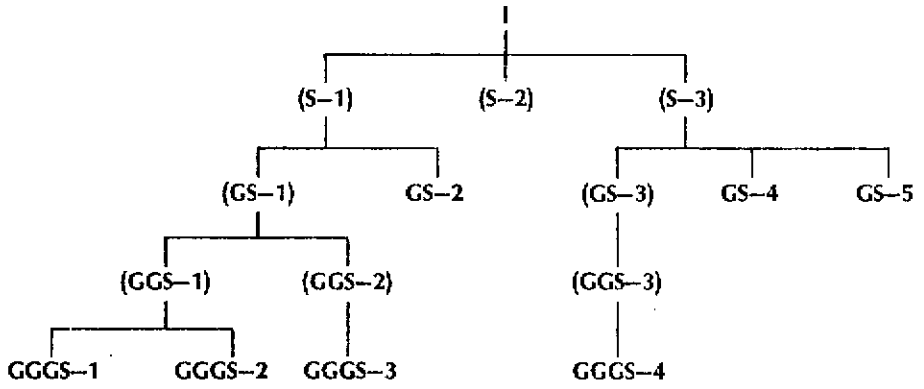

Fig. 3

stirpes with per stirpes representation system, the per capita with per stirpes representation system, the per capita with per capita representation system, and the per capita at each generation system. There are two primary shares under the per stirpes method and five under the per capita method. Under the per stirpes with per stirpes representation system, GS-2 receives one-fourth of the estate and GS-4 and GS-5 each receive one-sixth of the estate. GS-1's family shares one-fourth of the estate by distribution of one-eighth of the estate to GGS-1's family and one-eighth of the estate to GGS-2's family. The result is that GGGS-1 and GGGS-2 each receive one-sixteenth of the estate and GGGS-3 receives one-eighth of the estate. GS-3's family receives one-sixth of the estate which is ultimately distributed to GGGS-4. Under the per capita with per stirpes representation system, GS-2, GS-4, and GS-5 each receive one-fifth of the estate. GS-1's family receives one-fifth of the estate, which is divided equally between GGS-1's family and GGS-2's family. The result is that GGGS-1 and GGGS-2 each receive one-twentieth of the estate and GGGS-3

202. Waggoner, *supra* note 188, at 632–53.

receives one-tenth of the estate. GS-3's family also receives one-fifth of the estate, which is ultimately distributed to GGGS-4. Under the per capita with per capita representation system, GS-2, GS-4, and GS-5 each receive one-fifth of the estate just as under the per capita with per stirpes representation system. Similarly, GS-1's family and GS-3's family each receive one-fifth of the estate and GGGS-4 again receives one-fifth of the estate. Different under this system, however, is that the one-fifth received by GS-1's family is not divided at the great-grandchild generation, but instead is divided at the great-great-grandchild generation. GGGS-1, GGGS-2, and GGGS-3 each receive one-fifteenth of the estate. Under the per capita at each generation system, GS-2, GS-4, and GS-5 again receive one-fifth of the estate. The remaining two-fifths is distributed equally among eligible takers in the great-great-grandchild generation, i.e., the next remote generation with living members. GGGS-1, GGGS-2, GGGS-3, and GGGS-4 each receive one-tenth of the estate.

The foregoing discussion delineates the major methods for determining the shares each designated lineal descendant should receive. There is no public policy reason to favor one system over another.[203] Thus, evaluation of these representational systems would seem to depend only on determining the citizen preferences as to whether they prefer to have decedent's children and their families treated equally or whether they prefer a system that totally abandons family stocks and treats living persons in the same generation equally. Formulating the issue in this manner suggests that the per capita with per stirpes representation system and the per capita with per capita representation system have little to recommend themselves because these methods neither maintain the family stocks nor insure that descendants who are in the same generation receive equal shares.

The prior will studies do not provide any data with respect to this question. In the Illinois study, over 95 percent of the respondents treated the grandchildren equally when the following question was asked:

> What percentage of your estate would you wish to give each survivor if you were survived only by four grandchildren? Assume that grandchild no. 1 is the child of a deceased son and grandchildren no. 2, no. 3, and no. 4 are the children of a deceased daughter.[204]

A similar question was asked of respondents in the present survey:

> How would you like your property distributed if you are survived only by

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203. See Maud v. Catherwood, 67 Cal. App. 2d 636, 651, 155 P.2d 111, 119 (1945) ("appellants urge that [the statute] should be construed to make the provision, 'fair.' Undoubtedly appellants mean fair as applied to their view of the facts and the law of this case"). See also Page, *supra* note 148, at 29 n.76, for a list of cases that have analyzed this question in terms of fairness and equity.

204. Illinois study, *supra* note 29, at 740–41.

three grandchildren? Two grandchildren are the offspring of one son. The third grandchild is the offspring of your other son. Both sons are deceased.

Similar results were obtained. Table 23 describes the responses. The per

TABLE 23

The Two Dominant Distribution Patterns for the Grandchildren Relation Set (Percent)[a]

Distribution Pattern by Percent of Estate to:				
First Son's Child 1	First Son's Child 2	Second Son's Child	Percent of Respondents in Pattern	*N*
33	33	33	94.9	711
25	25	50	2.5	19
Other			2.5	19
Total			99.9	749

[a] 1 missing case.

stirpes with per stirpes system would require each of the first son's children to receive 25 percent of the estate and the second son's child to receive 50 percent of the estate. The three per capita representational systems would permit the grandchildren to share equally in the estate, i.e., each would receive 33 percent of the estate. The per capita systems were clearly favored by the respondents.

The following question was asked to further clarify and understand the respondent's preferences in this area. It is a combination of the first two questions concerning children and grandchildren (see tables 21 and 23 above).

How would you like your property distributed if you are survived only by one adult son and three grandchildren? Your surviving son has no children. Two of your grandchildren are the offspring of one deceased son and the third grandchild is the offspring of another deceased son.

Table 24 describes the responses. Per stirpes with per stirpes representation, per capita with per stirpes representation, and per capita with per capita representation would require the following distribution under this hypothetical:

	Percent
Living son	33
First deceased son's child 1	16
First deceased son's child 2	16
Second deceased son's child	33

Per capita at each generation would require the following distribution:

	Percent
Living son	33
First deceased son's child 1	22
First deceased son's child 2	22
Second deceased son's child	22

The findings clearly demonstrate that the respondents reject the notion that family stocks must be treated equally. Only 8.5 percent of the respondents gave each of the three families 33 percent of the estate. Although only 10 respondents distributed the property in accordance with the distribution provided in the per capita at each generation system, 574 of the 659 respondents (87.1 percent) who distributed part of

TABLE 24

The Six Dominant Distribution Patterns for the Living Son–Grandchildren in One Family–Grandchildren in Another Family Relation Set (Percent)[a]

Distribution Pattern by Percent of Estate to:					
Living Son	First Deceased Son's Child 1	First Deceased Son's Child 2	Second Deceased Son's Child	Percent of Respondents in Pattern	*N*
100	0	0	0	12.0	90
50	16	16	16	17.4	130
40	20	20	20	2.7	20
33	22	22	22	1.3	10
33	16	16	33	8.5	64
25	25	25	25	41.5	311
0	33	33	33	8.1	61
Other				8.4	63
Total				99.9	749

[a]1 missing case.

the estate to at least one grandchild treated the grandchildren equally. In short, the respondents were not in agreement as to the proper share the living son should receive, but they were in general agreement that the grandchildren should be treated equally. Respondents consistently distributed equal shares of the estate to the grandchildren in the three hypothetical situations posed concerning children and grandchildren. These results indicate that legislatures should consider adopting the per capita at each generation system for determining the share of the estate each lineal descendant should receive.[205] These results further indicate that attorneys may be performing a disservice to their clients if they assume, without discussion, that the clients would prefer to treat their children's families equally rather than to treat persons in the same generation equally.[206]

205. Interestingly in 1975, as a result of Lawrence Waggoner's A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants, 66 Nw. U.L. Rev. 626 (1971), the Joint Editorial Board amended its commentary to UPC § 2-103 and recommended adoption of the per capita at each generation system. If states adopt the per capita at each generation system, adjustments to other statutory provisions may be necessary. E.g., antilapse statute (N.C. Gen. Stat. § 31-42 (1976)).

206. An indication that testators and settlors are not being advised is that no will and trust forms provided by the major banks located in Chicago suggest a dispository provision for distribution to issue in a per capita at each generation manner. The two alternative provisions indicated below define per capita at each generation when used in a trust or will:

V. Conclusion

The purpose of this survey was to discover popular beliefs and preferences concerning the distribution of property at death. A state's intestate succession law operates as a substitute estate plan when a decedent fails to provide for the orderly distribution of all of his or her property through a will or will substitute. The findings of this survey, in conjunction with prior will studies and considerations of community needs, provide a framework for evaluation of existing intestacy statutes to determine whether they serve that function well. The 750 adults living in Alabama, California, Massachusetts, Ohio, and Texas interviewed by telephone were asked, in addition to questions pertaining to testamentary freedom, how they would distribute their property among survivors in a number of hypothetical relation sets. The choices included: parents and siblings; parents and spouse; spouse and children; children and grandchildren; and grandchildren of one child and grandchildren of another child. These responses were compared first to existing intestate succession statutes and then to distributive patterns that best satisfy community needs.

The responses were also compared by various social strata. The major difference found among respondents from different social strata is that the older, wealthier, and more educated respondents are more likely to have a will. The responses to the relation sets, however, revealed few significant differences that could be attributed to age, education, income, or occupational status. Moreover, no significant differences were found in attitudes toward property distributions between those who have a will and those who do not. The absence of significant differences by respondent's status is surprising; however, respondents reproduced essentially identical distributive patterns under varying hypothetical estate sizes. These results suggest that the values underlying the respondents' choices are both consensual and cultural, rather than class based or economic in nature. These findings effectively validate the use of wills as evidence of intestate

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Alternative I:

The term "per capita at each generation" means that property shall be distributed to the persons and in the proportions that the Settlor's personal property would be distributed under the laws of the state of North Carolina in force on the date this instrument was executed if the Settlor had died intestate on the specified date of distribution, domiciled in such state, not married and survived by descendants.

Alternative II:

The term "per capita at each generation" means that property shall be distributed to the persons in the following manner. The estate is divided into as many shares as there are living descendants in the generation nearest to me which contains living descendants on the specified date of distribution and deceased persons in that same generation who left descendants who survive to the specified date of distribution. Each living descendant in the nearest generation to me which contains any living descendants is allocated one share and the remainder of the estate is divided in the same manner as if the descendants already allocated a share and their descendants had predeceased the specified date of distribution.

decedents' distributive preferences. Despite the fact that testate decedents tend to be wealthier and more educated, their distributive preferences are likely to be the same as those of less wealthy and less educated persons.

All reforms to existing statutes suggested in this article assume that intestate succession would be, in all cases, determined by an inflexible statutory pattern that would apply to all situations. Although foreign jurisdictions have adopted succession laws that give the courts the power to make provisions out of an estate for dependents of the deceased,[207] no similar legislation has as yet developed in the United States.[208] Given the hardships created by existing intestacy statutes, it is not surprising that some commentators suggest that some flexibility and discretion should be introduced into the intestacy statutes.[209] The obvious disadvantage of such legislation is that it leaves substantial discretion to the probate court to determine ownership of a decedent's estate according to standards which by necessity must be vague.[210] Support for the discretionary succession law is likely to grow, however, if legislatures continue to be reluctant to amend intestacy statutes to mirror the distributive preferences of decedents and meet the needs of our modern society.

Based on the findings of this study and prior studies, as well as on a consideration of the community's interests in the disposition of a decedent's property at death, a modern intestacy statute should provide the following:

(1) siblings share in the estate with parents;
(2) the surviving spouse inherit the entire estate in preference to the decedent's family of orientation;

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207. E.g., England's Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63.

208. But see La. Civ. Code Ann. art. 2382 (West Cum. Supp. 1978) (if either spouse dies "rich" leaving the surviving spouse in "necessitous circumstances," the latter has the right to one-fourth of the decedent's estate if no children survive, but if one, two, or three children, spouse has the right to one-fourth in usufruct only, and if more than three children, spouse shall receive only a child's share in usufruct); Vt. Stat. Ann. tit. 14, § 401 (1974) (the surviving spouse of a decedent shall receive from an intestate decedent's estate that part of the personalty owned by the decedent that the probate court assigns according to the surviving spouse's circumstances and the "estate and degree" of the decedent; but the share of personalty shall not be less than one-third after payment of claims against the estate).

209. See, e.g., Friedman, *supra* note 4, at 20. Cf. W. D. MacDonald, Fraud on the Widow's Share 301–27 (Ann Arbor: University of Michigan Law School, 1960); Chaffin, *supra* note 53, at 462–63; Paul G. Haskell, Restraints Upon the Disinheritance of Family Members, in Death, Taxes and Family Property, *supra* note 4, at 105, 113–14.

210. Cases arising as a result of the discretion accorded the courts in Louisiana provide excellent examples of the kind of litigation that can be expected. See, e.g., Succession of Spencer, 289 So. 2d 850 (La. App. 1974); Succession of W. Harris, 283 So. 2d 325 (La. App. 1973). For review of litigation experience of discretionary legislation in British commonwealth countries, see Elias Clark, Louis Lusky, & Arthur W. Murphy, Cases and Materials on Gratuitous Transfers: Wills, Intestate Succession, Trust, Gifts and Future Interests 208 (2d ed. St. Paul: West Publishing Co., 1977).

(3) the surviving spouse inherit the entire estate in preference to the decedent's children who are also the natural or adopted children of the spouse;
(4) the surviving spouse inherit up to 70 percent of the estate when the decedent is also survived by children who are not the natural or adopted children of the spouse;
(5) all children share equally in the estate, regardless of whether they were born of different marriages or whether they are legitimate or nonmarital children; and
(6) issue who are in the same generation share equally in the estate.

The reforms suggested by the authors have the advantage of satisfying the needs of the decedent's family as well as the distributive preferences of the decedent without the disadvantage of burdensome administration. At the least, before states adopt the drastic solution of a discretionary succession law to obtain a better statutory estate plan, the amendments to existing intestacy laws suggested here should be enacted and tested.

APPENDIX

APPENDIX TABLE A1

Percent Mean Award to Father and Mother in Father-Mother-Brother-Sister Relation Set by Actual and Hypothetical Estate Size

Actual to Hypothetical Situation			*Percent Mean Award to Father for*			*Percent Mean Award to Mother for*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Percent Mean Difference for Father	Actual Estate	Hypothetical Estate	Percent Mean Difference for Mother
$12,999 or less ...	$100,000	31	39.8	37.5	-2.3	31.3	29.0	-2.3
$13,000-$25,999 .	$100,000	56	39.2	37.0	-2.2	30.9	29.3	-1.6
$26,000-$49,999 .	$100,000	53	32.4	32.0	-0.4	31.5	32.0	-0.5
$12,999 or less ...	$ 20,000	43	32.1	30.7	-1.4	35.2	33.0	-2.2
$13,000-$25,999 .	$ 6,000	53	39.5	37.7	-1.8	26.4	26.5	+0.1
$26,000-$49,999 .	$ 6,000	75	39.4	40.4	-1.0	33.7	33.2	-0.5
$50,000-$99,999 .	$ 20,000	130	35.3	34.3	-1.0	30.9	30.9	0.0
$50,000-$99,999 .	$ 6,000	119	35.4	34.9	-0.5	27.9	30.0	+0.1
$100,000 or more	$ 20,000	99	38.8	38.2	-0.6	31.4	29.4	-2.0
$100,000 or more	$ 6,000	84	33.5	34.0	-0.5	27.9	30.7	+2.8

APPENDIX TABLE A2

Percentage of Estate to Spouse by Family Status for Currently Married Respondents for Spouse-Mother Relation Set[a]

	Percent to Spouse			
Family Status	100%	51%-99%	50%	Row *N*
No children	69.1	21.8	9.1	55
Some minor children ..	74.3	18.0	7.7	401
All adult children	69.1	17.8	13.1	259
Column *N*	515	130	70	715

$\chi^2 = 5.8$; $df = 4$; $p = .21$.

[a]16 missing cases; in addition, for simplicity of presentation, one respondent who allocated less than 50 percent to the spouse was excluded.

APPENDIX TABLE A3

Percentage of Estate to Spouse by Number of Years Married for Currently Married Respondents for Spouse-Mother Relation Set[a]

	Percent to Spouse			
Years Married	100%	51%-99%	50%	Row *N*
1-3.....	62.5	20.0	17.5	40
4-7.....	73.5	19.6	6.9	102
8-19.....	72.8	18.8	8.4	202
20-30.....	76.4	15.3	8.3	157
31-60.....	69.2	18.7	12.1	214
Column *N*	515	130	70	715

$\chi^2 = 7.5$; $df = 8$; $p = .48$.

[a]16 missing cases; in addition, for simplicity of presentation, one respondent who allocated less than 50 percent to the spouse was excluded.

APPENDIX TABLE A4

Award of 100 Percent of Estate to Spouse in Spouse-Mother Relation Set by Actual and Hypothetical Estate Size[a]

Actual to Hypothetical Situation			*100 Percent to Spouse*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Difference
$12,999 or less	$100,000	31	64.5	48.4	-16.1
$13,000–$25,999	$100,000	56	67.9	53.6	-14.3
$26,000–$49,999	$100,000	53	66.0	45.3	-20.7
$12,999 or less	$ 20,000	43	62.8	51.2	-11.6
$13,000–$25,999	$ 6,000	53	66.0	64.2	- 1.8
$26,000–$49,999	$ 6,000	75	72.0	73.3	+ 1.3
$50,000–$99,999	$ 20,000	130	66.9	58.5	- 8.4
$50,000–$99,999	$ 6,000	119	71.4	69.7	- 1.7
$100,000 or more	$ 20,000	99	77.8	69.7	- 8.1
$100,000 or more	$ 6,000	84	81.0	79.3	- 1.7

[a]For further description, see notes 118-19 *supra*.

APPENDIX TABLE A5

Percentage of Estate to Spouse by Sex for Currently Married Respondents for Spouse-Minor Son-Minor Daughter Relation Set[a]

Sex of Respondent	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
Male	61.7	10.2	21.6	6.5	371
Female	55.7	3.6	26.1	14.6	357
Column *N*	428	51	173	76	728

$\chi^2 = 25.3$; $df = 3$; $p < .0000$.
[a]4 missing cases.

APPENDIX TABLE A6

Percentage of Estate to Spouse by Sex for Currently Married Respondents for Spouse-Minor Child-Adult Child Relation Set[a]

Sex of Respondent	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
Male	54.4	16.2	22.1	7.3	371
Female	49.3	7.6	28.3	14.8	357
Column *N*	378	87	183	80	728

$\chi^2 = 24.5$; $df = 3$; $p < .0000$.
[a]4 missing cases.

APPENDIX TABLE A7

Award of 100 Percent of Estate to Spouse in Spouse-Minor Son-Minor Daughter Relation Set by Actual and Hypothetical Estate Size

Actual to Hypothetical Situation			*100 Percent to Spouse*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Difference
$12,999 or less	$100,000	31	35.5	32.3	- 3.2
$13,000–$25,999	$100,000	56	60.7	58.2	- 2.5
$26,000–$49,999	$100,000	53	60.4	52.8	- 7.6
$12,999 or less	$ 20,000	43	51.2	46.5	- 4.7
$13,000–$25,999	$ 6,000	53	54.7	50.9	- 3.8
$26,000–$49,999	$ 6,000	75	57.3	66.7	+ 9.4
$50,000–$99,999	$ 20,000	130	60.8	59.7	- 1.6
$50,000–$99,999	$ 6,000	119	61.3	68.6	+ 7.3
$100,000 or more	$ 20,000	99	62.6	66.7	+ 4.1
$100,000 or more	$ 6,000	84	56.0	69.0	+13.0

APPENDIX TABLE A8

Percentage of Estate to Spouse by Family Income for Currently Married Respondents for Spouse-Child of a Prior Marriage Relation Set

Family Income	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
Under $8,000	26.6	23.4	37.1	12.9	124
$8,000–$13,999	25.1	27.0	37.0	10.9	211
$14,000–$19,999	24.2	27.5	37.9	10.4	182
$20,000–$24,999	21.3	38.9	32.4	7.4	108
$25,000 or more	15.0	32.7	40.2	12.1	107
Column *N*	169	213	271	79	732

$\chi^2 = 13.1$; $df = 12$; $p = .36$.

APPENDIX TABLE A9

Percentage of Estate to Spouse by Actual Size for Currently Married Respondents for Spouse-Child of a Prior Marriage Relation Set[a]

Actual Estate	*Percent to Spouse* 100%	51%–99%	50%	0%–49%	Row *N*
$0–$12,999	30.9	23.5	36.8	8.8	68
$13,000–$25,999	22.6	24.5	36.8	16.0	106
$26,000–$49,999	26.4	31.8	31.8	10.1	129
$50,000–$99,999	21.5	28.5	39.0	11.0	246
$100,000 or more	20.3	33.0	37.9	8.8	182
Column *N*	169	213	270	79	731

$\chi^2 = 11.0$; $df = 12$; $p = .53$.
[a]1 missing case.

APPENDIX TABLE A10

Percent Mean Award to Spouse in Spouse–Child of a Prior Marriage Relation Set by Actual and Hypothetical Estate Size

Actual to Hypothetical Situation			*Percent Mean Award to Spouse for*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Difference
$12,999 or less	$100,000	31	64.7	66.9	+ 2.2
$13,000–$25,999	$100,000	56	58.4	78.3	+19.9
$26,000–$49,999	$100,000	53	64.1	77.1	+13.0
$12,999 or less	$ 20,000	43	64.2	69.4	+ 5.2
$13,000–$25,999	$ 6,000	53	62.0	70.3	+ 8.3
$26,000–$49,999	$ 6,000	75	68.7	78.0	+ 9.3
$50,000–$99,999	$ 20,000	130	64.3	74.4	+10.1
$50,000–$99,999	$ 6,000	119	60.1	76.7	+16.6
$100,000 or more	$ 20,000	99	66.5	79.6	+13.1
$100,000 or more	$ 6,000	84	63.2	74.4	+11.2

APPENDIX TABLE A11

Percent Mean Award to Child of Present Marriage in Minor Child of Present Marriage–Minor Child of Former Marriage Relation Set by Actual and Hypothetical Estate Size

Actual to Hypothetical Situation			*Percent Mean Award to Child of Present Marriage for*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Difference
$12,999 or less	$100,000	31	58.5	55.0	- 3.5
$13,000–$25,999	$100,000	56	56.7	56.7	0.0
$26,000–$49,999	$100,000	53	55.5	56.8	+ 1.3
$12,999 or less	$ 20,000	43	49.5	51.4	+ 1.9
$13,000–$25,999	$ 6,000	53	54.8	54.5	- 0.3
$26,000–$49,999	$ 6,000	75	58.9	57.6	- 1.3
$50,000–$99,999	$ 20,000	130	56.9	59.2	+ 2.3
$50,000–$99,999	$ 6,000	119	56.4	56.2	- 0.2
$100,000 or more	$ 20,000	99	56.0	56.3	+ 0.3
$100,000 or more	$ 6,000	84	54.1	50.7	- 3.4

APPENDIX TABLE A12

Percent Mean Award to Son in Son–Living Son's Child–Deceased Son's Child Relation Set by Actual and Hypothetical Estate Size

Actual to Hypothetical Situation			*Percent Mean Award to Son for*		
Actual Estate	Hypothetical Estate	*N*	Actual Estate	Hypothetical Estate	Difference
$12,999 or less	$100,000	31	49.9	50.4	+ 0.5
$13,000–$25,999	$100,000	56	55.4	52.7	- 2.7
$26,000–$49,999	$100,000	53	53.2	54.9	+ 1.7
$12,999 or less	$ 20,000	43	51.5	46.7	- 4.8
$13,000–$25,999	$ 6,000	53	61.1	51.0	-10.1
$26,000–$49,999	$ 6,000	75	56.7	49.0	- 7.7
$50,000–$99,999	$ 20,000	130	46.0	46.1	+ 0.1
$50,000–$99,999	$ 6,000	119	55.2	52.5	- 2.7
$100,000 or more	$ 20,000	99	52.3	46.8	- 5.5
$100,000 or more	$ 6,000	84	46.7	39.0	- 7.7