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The New North Dakota Probate Code

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THE NEW NORTH DAKOTA PROBATE CODE

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I. INTRODUCTION

The need to modernize the probate laws of most jurisdictions in the United States was first documented over three decades ago. In 1940 Professor Atkinson painted his "gloomy picture" of probate and expressed his feeling that even if an attempt were made to improve the probate laws, few jurisdictions would adopt them.[1] By 1946, the Section of Real Property, Probate and Trust Law of the American Bar Association was able to draft and prepare the Model Probate Code.[2] The Model Code was not meant to be a uniform act, but rather a "reservoir of ideas"[3] and while it influenced legislation in some thirteen states,[4] little was done to make uniform the various procedural and substantive laws of the various states until 1962. In that year the Section of Real Property, Probate and Trust Law of the American Bar Association took the initiative and began work with the National Conference of Commissioners on Uniform State Laws to draft a Uniform Probate Code based on the Model Code.[5] Whether the time lag between the drafting of the Model Code to the action taken by the ABA was due to the fact that there were more important problems facing that body or was due to the fact that there were few incentives for change until the mid-sixties is of little relevance to any discussion at this point.[6] The fact is that in 1969 the American Bar Association approved the *Uniform Pro-*

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1. Atkinson, *Wanted—A Model Probate Code*, 23 AM. JUR. SOC. J. 183, 189 (1940).
2. L. SIMES & P. BAYSE, PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE (1946).
3. *Id.* at 10.
4. Fratcher, *Estate Planning and Administrators Under the Uniform Probate Code*, 110 T. & E. 5 (1971).
5. *Id.*
6. The public outcry was encouraged, probably justifiably, by Mr. Dacey's suggested approach to wealth transfer. N. DACEY, HOW TO AVOID PROBATE (1965). There is now no lack of commentary on the problems of "probate." *See* M. BLOOM, THE TROUBLE WITH LAWYERS, OUR UNKNOWN HEIRS 233-63 (1968); *Settling an Estate Could be Faster and Cheaper*, 26 CHANGING TIMES No. 11 Nov. 1972, at 6; *Let's Rewrite the Probate Laws*, 23 CHANGING TIMES, Jan. 1969, at 39.

bate Code;[7] since that time, it has been adopted by two state legislatures[8] and is being studied by many others.[9] The Code (with a few modifications for compliance with North Dakota Constitutional requirements) was introduced as House Bill No. 1040 to the Forty-third Legislative Assembly of North Dakota in January of 1973.[10] The bill created a new title 30.1 of the North Dakota Century Code, which will substantially change several areas of North Dakota law relating to decedent's estates as well as introduce some new concepts to the administration of North Dakota estates. This article will discuss selected areas of Title 30.1 and the Code's effect on North Dakota law.

II. CHANGES IN INTESTATE SUCCESSION UNDER THE CODE

Schemes of intestate distribution, or the estate plan which the state provides if a decedent fails to, are ordinarily designed for the distribution of a decedent's estate in the manner which presumably reflects the normal desires of decedents of average wealth. The Code is no exception and, while there are some changes from prior North Dakota law relating to intestate distribution, there are few conceptual alterations. The chart on the following page compares the Code with prior law.

As indicated by the chart, the Code differs from the prior law in several areas. The Code allows the spouse who survives, with issue of the decedent also surviving, to receive the first $50,000 of the net estate plus one-half the remainder.[15] However, if one or more of the issue surviving are not also issue of the surviving spouse, then the surviving spouse takes only one-half without also taking the first $50,000.[16] The prior law allowed the straight one-half share to the surviving spouse without regard to the relationship between the surviving issue of the intestate and the surviving spouse.[17] Presumably the spouse is legally obligated to care for the children of a surviving spouse and decedent; the Code allows a more reasonable share for this purpose.

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7. Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (1970) [hereinafter the Uniform Probate Code will be cited as Code].

8. Idaho was the first state to adopt the Code, (IDA. CODE ANN. §§ 15-1-101 to 15-7-307 (Supp. 1972)) and Alaska the second (ALAS. STAT. ANN. § 13.06-13.36 (1962)).

9. AMERICAN BAR ASSOCIATION, REPORT OF THE UNIFORM PROBATE CODE COMMITTEE OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 2 (1970).

10. As this issue was going to press, both houses of the North Dakota legislature had passed H.B. 1040 and it was awaiting the Governor's signature. When signed into law, the Code will become effective July 1, 1975.

15. N.D. CENT. CODE § 30.1-04-02(3) (effective July 1, 1975).
16. N.D. CENT. CODE § 30.1-04-02(4) (effective July 1, 1975).
17. N.D. CENT. CODE § 56-01-04(1)(b) (1972).

Spouse	Issue	Parents	Issue of Parents	Grandparents/Issue/Next of Kin	Prior North Dakota Law[11]	Uniform Probate Code[12]
▽	▽	□	□	□	One-half to spouse; one-half to issue	One-half to spouse; one-half to issue ONLY if one or more issue surviving is not also the issue of the surviving spouse. If all issue are of decedent and surviving spouse, then first $50,000 and one-half remainder to spouse; one-half the remainder to the issue
▽	0	▽	□	□	First $50,000 and one-half remainder to spouse; one-half remainder to parents	Same
▽	0	0	▽	□	First $100,000 and one-half remainder to spouse; one-half remainder to brothers and sisters of decedent	All to spouse
▽	0	0	0	□	All to spouse	Same
0	▽	□	□	□	All to issue	Same
0	0	▽	□	□	All to parents	Same
0	0	0	▽	□	All to brothers and sisters of decedent	Same
0	0	0	0	▽	All to "next of kin"	All to grandparents and their issue
0	0	0	0	0	Escheat to state for the support of the common schools[13]	Passes to the state[14]

▽ indicates that a member of that class has survived the intestate.
0 indicates that no member of that class has survived the intestate.
□ indicates that the survival of a member of that class would make no difference in the distribution.

Another difference between the Code and prior law is that the prior law provided for decedent's brothers and sisters in the event he died without issue. A decedent's spouse would receive the first $100,000 and one-half the remainder, while the decedent's brothers

11. N.D. CENT. CODE § 56-01-04 (1972).
12. N.D. CENT. CODE § 30.1-04-02, 03 (effective July 1, 1975).
13. N.D. CENT. CODE § 56-01-04(6) (1972).
14. N.D. CENT. CODE § 30.1-04-05 (effective July 1, 1975).

and sisters would share the other half.[18] Under the Code, gifts to siblings will have to be made specifically by will, since if there is no issue, the spouse takes all.[19]

Finally, the prior law provided for distribution to "next of kin" after failure of issue of parents and their issue.[20] This provision allows for the "laughing heir" situation;[21] the new Code provision cuts off distribution after the issue of grandparents and their issue, denying "laughing heir" status to more remote kin.[22]

One of the areas in which the Code will hopefully provide clarity is in providing a method for distribution of intestate property among lineal and collateral heirs, where some or all of the most closely related heirs predecease the intestate. The confusion inherent in the North Dakota statutes prior to the Code is caused by the fact that it is unclear when the per capita or one of the several per stirpes methods of distribution should be used. These methods of distribution are different in that a per capita distribution allows each heir to take an equal share with every other heir, regardless of the degree of heirship to the intestate decedent.[23] A strict per stirpes distribution, on the other hand, is based upon the number of children that the decedent had living at his death, or that predeceased him with issue surviving. A share is set aside for each child, or dead child leaving issue, and then is further divided by the number of lineal descendents of the decedent's children.[24] The per stirpes method is considered more equitable,[25] and with some modification, is the law in most jurisdictions. It is this modification which has caused some confusion in the past. Professor

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18. N.D. CENT. CODE § 56-01-04(2) & (d) (1972).
19. N.D. CENT. CODE § 30.1-04-02(1) (effective July 1, 1975).
20. N.D. CENT. CODE § 56-01-04(4)(a) (1972).
21. The term is usually used to describe an heir far removed from the decedent who takes the estate because there are no heirs of a closer degree. He is ordinarily so far removed from his ancestor that he suffers no feeling of personal loss; hence the term "laughing heir."
22. N.D. CENT. CODE § 30.1-04-03(4) (effective July 1, 1975).
23. For example, suppose X dies intestate leaving a child A, and four grandchildren, b(1), child of X's deceased child B, and c(1), c(2), and c(3), children of X's deceased child, C. Each of these heirs would take an equal share under the per capita method of distribution.
24. In the example given in note 23, *supra*, under a strict per stirpes method of distribution A would receive a one-third share, b(1) would also take a one-third share as his parent's representative, and the children of C would divide C's share, each taking ultimately one-ninth of X's estate.
25. An inequitable result may well be reached when dealing with a strict per stirpes method. Assume in the example in note 23, *supra*, that A predeceased X leaving two children a(1) and a(2). In that case the only heirs of X are his granchildren; there is no reason why the state should presume that X would prefer his grandchildren to be treated other than equally. Under a strict stirpes distribution however, a(1) and a(2) would each take one-sixth, b(1) would take one-third, and c(1), c(2) and c(3) each would receive one-ninth. Most jurisdictions attempt to avoid this treatment by modifying the strict per stirpes rule where all of decedent's children predecease him, in which case they require a per capita distribution. N.D. CENT. CODE § 56-01-04(1)(b) (1972). This is often called the per stirpes distribution with the per capita exception. Under this method of distribution, all of X's grandchildren would share equally in his estate if all of X's children had predeceased him.

Heckman pointed out the problem in 1969 when he noted the anomalous results reached by reading several sections of the Century Code relating to per stirpes and per capita distribution together. Such a reading indicated that the Century Code provisions allowed both methods.[26] The Uniform Probate Code now permits only the modified per stirpital method, thus resolving this ambiguity.[27]

III. PROTECTION OF THE SPOUSE

Some form of protecting spouses of decedents from disinherison has been afforded to widows and (less often) widowers since early in the common law. Whether by custom, the common law, or the dictate of the sovereign, the widow has usually been provided for. As early as the twelfth century, it was recognized that the wife of a deceased had an enforceable interest in some part of her late husband's personal property.[28] By custom or dictate, the process of legitim, later called the custom of London, allowed a decent who died leaving no issue or wife surviving to give away all of his chattels in any manner he desired. However, if he left a wife surviving but no issue, or issue but no wife, his chattels were divided into two equal shares: the "dead's part," which was disposed of by will, and the other part, which was to go to the surviving wife or children.[29] The property of the decedent who left both a wife and children surviving was divided into three equal shares: the dead's part, the wife's part, and the "bairn's part."[30] The children receiving the bairn's part were required to bring into hotchpot any advancement before being allowed to share in that portion of the estate.[31] In the 17th century this custom was still prevalent in Scotland and the City of London[32]—hence the name

26. Heckman, *The Treatment of Some Traditional Problems of Intestate Succession in the North Dakota Century Code*, 45 N.D. L. REV. 465, 469-71 (1969). Heckman noted that while N.D. CENT. CODE § 56-01-04(1)(b) (1972) adopted the modified per stirpital method, § 56-01-04(1)(c) (1972) prescribed a strict per stirpes distribution. The only substantive difference between these two subsections is that the former is applicable to situations where a spouse, as well as children, survive the intestate, while the latter is applicable to situations in which only issue survive. While it may be argued that a modified per stirpital method is better than a strict per stirpital method or vice versa, no equitable argument can be made for permitting both in situations of such similarity.

27. N.D. CENT. CODE § 30.1-04-06 (effective July 1, 1975) states:
> If representation is called for by this title, 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.

28. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 349 (2d ed. 1898).

29. *Id.* at 348-49.

30. *Id.* at 348.

31. *Id.* at 349. "Hotchpot" is a bookkeeping maneuver by which the child whose share has been anticipated accounts for it before receiving anything from the decedent's estate. *See* text accompanying notes 85 to 94, *infra*.

32. F. POLLOCK & F. MAITLAND, *supra* note 28, at 439.

Custom of London. There is some commentary supporting the idea that the Magna Carta provided a statutory base for legitim, but it was more likely a common law custom.[33]

On the real property side of the issue was, of course, dower. As finally refined by the common law courts,[34] dower was the right to retain a life estate in a one-third interest in all the real property owned by the husband during coverture.[35]

The custom of legitim has since disappeared from usage and dower has been abolished by statute.[36] There is no evidence indicating the reasons for the decline and final demise of legitim, but there need be no speculation on the abolition of the estate of dower. Its strength was also its downfall. Since the inchoate right of dower existed upon marriage and lasted until the husband's death, dower conflicted with the newer and expanding concept of freedom of alienation. Dower became a clog on titles. No transferee of real property could be absolutely certain that somewhere in the chain of title there wasn't a widow. Since the property could not be sold during the husband's lifetime without the consent of the wife, its market value declined. As far as providing security for the widow, that too came under fire from anti-dower forces. Dower was vulnerable for several reasons—first, it was applicable only to real property at a time when wealth was becoming more and more intangible, and secondly, it could be defeated by several methods such as by taking title in a corporate name with the majority (or sole) interest being held by the husband.[37]

While dower and curtesy have been abolished in most jurisdictions, state legislatures have usually recognized that there is some social value in the idea of preventing complete disinheritance of the spouse. They have enacted forced share election statutes or some other dower substitute.[38] With the exception of North Dakota and South Dakota, all the jurisdictions that have abolished dower have enacted some form of forced share statute in its place. While such

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33. *Id.* at 350, 355.

34. For a history of dower and its various interpretations see F. POLLOCK & F. MAITLAND, *supra* note 28, at 420-28.

35. 2 W. BLACKSTONE, COMMENTARIES 129 (1897).

36. N.D. CENT. CODE § 14-07-09 (1971); N.D. CENT. CODE § 56-01-02 (1972). These statutes have abolished dower and its similar male counterpart, curtesy. The Uniform Probate Code also abolishes dower and curtesy. N.D. CENT. CODE § 30.1-04-13 (effective July 1, 1975).

37. This situation had the effect of a result adverse to the purpose of dower. Dower was intended to provide financial protection for the widow and allow her to be free from poverty for her remaining years. If it could be defeated with such simple schemes as alternative forms of wealth or ownership, dower would exist only where it was not necessary: where a husband was willing to provide for his widow.

38. Applicable only in cases where the decedent left a will, a typical forced share statute gives the decedent's surviving spouse a choice of taking under the will or accepting a share of the net estate—usually the share which the spouse would have received had the decedent died intestate. *See, e.g.*, COLO. REV. STAT. ANN. § 153-5-4 (1) (1963).

statutes provide better protection than dower by including all property of the estate of the decedent—personal as well as real—they are less protective in that only the property which passes through the estate of the testator is included in the computation of the widow's forced share. Thus, any property conveyed by inter vivos transfer is excluded from computation. As a result, the statutory forced share as currently in force in most non-community property jurisdictions can be criticized as not providing the intended protection. The reviewers of the Uniform Probate Code considered this problem in the drafting of the code,[39] and arrived at the "augmented estate" concept to be used in computation of a spouse's forced share. Before considering this controversial concept, a consideration of whether this state should enact any spousal protection statute is in order, especially in light of the fact that the state legislature has never yet felt the necessity to enact any forced share protection statute. It may be that preventing a decedent from disinheriting his spouse is an area in which a legislature should not concern itself. However, if a state interest is involved, the legislature must decide what method of protection is most reasonably calculated to best promote that interest.

In the great majority of cases, a surviving spouse is well taken care of either by the state's estate plan of intestate distribution or by the conscious action of the decedent in making a will. That is not to say that the disinherison of a spouse never occurs. In the situation where a testator has disinherited his wife, his motives are ordinarily one of two: either he has properly taken care of his wife in other ways—by insurance or other methods of inter vivos transfer; or he intentionally, for rational or irrational reasons of his own, preferred that she should not participate in the distribution of his wealth. In the former situation, a forced share statute is of no help, and is in fact a liability, since it detracts from an otherwise equitable wealth transfer plan devised by the testator. In the latter situation, if the husband's motives are in fact improper, the forced share as it presently exists is of no help either since the husband can avoid the operation of the forced share statute by conveying away his property prior to his death—either through a trust device or by absolute conveyance.

In many states a husband is required by law to support his family.[40] It is an interesting anomaly to recognize this duty as sufficiently important to be required by the state during life and yet not require a similar mandate upon the death of the husband. The

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39. *See* UNIFORM PROBATE CODE Article 2, Part 2, General Comment.
40. "Duty to support. —The husband must support himself and his wife out of his property or by his labor. . . ." N.D. CENT. CODE § 14-07-03 (1971).

state interest recognized in the first instance[41] is just as valid when considering the support of a surviving spouse who had been disinherited.

As mentioned above, under a typical forced share statute the surviving spouse is entitled to elect against the will and take her intestate share instead. This type of statute is unsatisfactory because it is limited to a share of the net estate and does not allow for any evasive depletion of the decedent's wealth prior to his death. Thus, any testator who wished to deprive his wife of this share would only have to convey his property prior to his death; the surviving spouse would take her intestate share—of nothing. This inequitable result led to several theories by which courts attempted to defeat the testator's intent. The most obvious attack was to call a particular transfer prior to death a "fraud" on the statutory share and thus voidable as against public policy. This approach has been codified in some forced share statutes.[42] The fraud tests required the court to rule on the motive of the decedent. If his intent was to avoid the statutory forced share, the transfer was voidable.[43] A separate test was established by the New York courts which looked to the adequacy of the transfer. The question under this test was whether the testator had actually and realistically parted with his property or merely hid it by illusory transfer.[44] This seemed to be a more objective test than the fraud approach. Unfortunately, this was not always the case, since the equities of a particular case usually prevailed over a strict application of the illusory test.[45] Additionally, since this test turned on the degree of control retained by the testator during his life its use endangered the utility of inter vivos trusts generally.

New York has recently attempted to solve the "net estate" problem without using either of the above-mentioned tests. That state now provides for the inclusion of various testamentary substitutes in the computation of the estate for forced share purposes.[46]

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41. Public support of the impoverished spouse is clearly of sufficient state interest to justify "duty to support" statutes. *See, e.g.*, N.D. CENT. CODE § 14-07-03 (1971).

42. *See, e.g.*, TENN. CODE ANN. § 31-612 (1955); VT. STAT. ANN. tit. 14 § 473 (1958).

43. There were several problems in making the subjective judgment as to what had been the decedent's motive. Of course the decedent himself was not available, so only hearsay testimony could be used. Additionally, surviving documents failed to provide much assistance, since they were more likely to reflect the expertise of counsel rather than the state of mind of the testator.

44. The test is defined by the Court of Appeals of New York in Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937): "[T]he only sound test of the validity of a challenged transfer is whether it is real or illusory. . . . [t]he test applied is essentially whether the husband has in good faith divested himself of ownership of his property. . . ." *Id.* at 969.

45. *See, e.g.*, Denver Nat'l. Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

46. Gifts causa mortis, bank account trusts and joint tenancy property would be included in this "forced share estate." N.Y. EPTL § 5-1.1 (b) (McKinney 1967).

This method is conceptually the same as the augmented estate approach under the Uniform Probate Code.

IV. THE AUGMENTED ESTATE

The augmented estate concept is useful in North Dakota not only for the protection it provides against disinheritance of the surviving spouse by allowing him or her to elect to take one-third of the decedent's estate, but also because it does so in a manner devoid of the many problems encountered by the courts in jurisdictions enacting traditional forced share statutes.[47] The augmented estate begins where the forced share statutes left off—the net estate.[48] To this is added the value of property transferred during the marriage (to anyone other than the spouse) for which the decedent did not receive "adequate and full consideration."[49] This provision is an attempt to avoid the problem of traditional forced share statutes which compelled courts to apply either the fraud test or the illusory test to set aside an inter-vivos transfer by which a decedent had attempted to defeat the statute.[50]

To this sum is added the value of certain properties owned by or transferred by the surviving spouse at any time during the marriage, which property was derived from the decedent and which would have been included in the surviving spouse's augmented estate had the spouse predeceased the decedent.[51] This third component in the augmented estate calculation has the effect of increasing the size of the estate with property already benefiting the surviving spouse, thus decreasing his or her share in other property.[52]

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47. The Code's concept of a net estate is comprised of a three-part computation which at first seems very complex. UNIFORM PROBATE CODE Article 2, Part 2, General Comment. The augmented estate is intended to provide traditional "forced-share" protection for the spouse without the possibility of a decedent defeating it by inter vivos transfer; but the method of computation also prevents a surviving spouse from electing a forced share when he or she has been adequately provided for other than by will. *Id.* at 30, 33.

48. The computation to determine the size of the augmented estate begins with the decedent's wealth at death reduced by funeral and administration expenses, homestead and family allowances, and enforceable claims. N.D. CENT. CODE § 30.1-05-02 (effective July 1, 1975).

49. Not all such transfers are included, but only those types specified in subsection (1), such as: transfers where decedent retained "possession or enjoyment of, or right to income from, the property" at the time of his death; where decedent retained power to revoke or consume principal for his own benefit; where decedent held property in joint tenancy with right of survivorship with someone other than the surviving spouse; of any transfers which aggregate in excess of $3,000 to one donee for either of the two years immediately preceding decedent's death. N.D. CENT. CODE § 30.1-05-02 (1) (effective July 1, 1975).

50. *See* notes 42 to 45 *supra* and accompanying text.

51. N.D. CENT. CODE § 30.1-05-02(2)(a). Such property includes the interest in a trust created for the surviving spouse's benefit by the decedent's life insurance payable to the surviving spouse and certain annuities payable to the surviving spouse.

52. It has this effect because, while it increases the size of the estate, the same property must be accounted for by the surviving spouse in satisfying the elective share. "[P]roperty which is part of the augmented estate which . . . has passed to the surviving spouse . . . is applied first to satisfy the elective share. . . ." N.D. CENT. CODE § 30.1-05-07(1) (effective July 1, 1975).

Since the Code establishes a presumption that all property owned by the surviving spouse has been derived from the decedent, the burden of showing that the property in this component was not so derived is on the surviving spouse.[53]

The Code's elective share is one-third of the total augmented estate[54] and must be petitioned for within six months of the first publication of the notice to creditors.[55] After a hearing to determine the value of the augmented estate, the court must order payment to the spouse from the assets of the augmented estate.[56] If these are insufficient, the court will order contribution from the original recipients of assets of the augmented estate.[57] It may be necessary to proceed against a recipient of assets of the augmented estate if voluntary contribution from him is not forthcoming.[58]

The election does not affect the statutory entitlement of a surviving spouse to a homestead allowance, exempt property or family allowance.[59] Nor does it affect the distribution of property which, without election, would have passed under the will or by intestacy to the surviving spouse; such property "is applied first to satisfy the elective share and to reduce the amount due from other recipients" of the assets of the augmented estate.[60]

The authors of the Uniform Probate Code recognized that the elective share provisions should not prevent specialized estate planning. They accordingly provided that a spouse may, after fair disclosure, waive not only elective rights but also the homestead, exempt property, and family allowances either before or after marriage.[61]

V. ADOPTION AND THE CODE

The Uniform Probate Code[62] is in accord with the spirit of the Revised Uniform Adoption Act[63] as to an adopted person's legal

53. N.D. CENT. CODE § 30.1-05-02(2)(c) (effective July 1, 1975).
54. N.D. CENT. CODE § 30.1-05-01 (effective July 1, 1975).
55. N.D. CENT. CODE § 30.1-05-05(1) (effective July 1, 1975).
56. N.D. CENT. CODE § 30.1-05-05(4) (effective July 1, 1975).
57. *Id.* Only original transferees or those receiving from them without consideration are subject to contribution. A bona fide purchaser for value would not be required to assist in making up the elective share. N.D. CENT. CODE § 30.1-05-07(3) (effective July 1, 1975).
58. N.D. CENT. CODE § 30.1-05(5) (effective July 1, 1975).
59. N.D. CENT. CODE § 30.1-05-06(2) (effective July 1, 1975).
60. N.D. CENT. CODE § CJ.V-05-07(1) (effective July 1, 1975).
61. N.D. CENT. CODE § 30.1-05-04 (effective July 1, 1975). The section was intended for parties to second and subsequent marriages "to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse," (UNIFORM PROBATE CODE § 2-204, Comment), but is of course not limited to that situation.
62. N.D. CENT. CODE § 30.1-04-09(1) (effective July 1, 1975) defines the rights accruing to the parties to an adoption relationship for the purposes of intestate succession.
63. The Revised Uniform Adoption Act [hereinafter referred to as Adoption Act] was enacted in 1971. N.D. CENT. CODE § 14-15-01 to 23 (1971).

relationship with his adoptive parents in matters of inheritance.[64] While the Adoption Code may be subject to interpretative difficulty, however, the Code is not. The Adoption Act provides that

> [t]he relationship of parent and child [is created] between [the parent] and the adopted individual, as if the adopted individual were a legitimate blood descendant of the petitioner [adoptive parent] for all purposes including inheritance. . . .[65]

It is clear that the Act provides that adopted persons are entitled to inherit from their adoptive parents and that adoptive parents are entitled to inherit from the children they adopt. However, since the Act is speaking specifically of the relationship existing between the adoptive parent and the adopted person, it could be questioned whether this applies to inheritance from the adopting parents' collaterals. In the case of *Hoellinger v. Molzhon*,[66] language similar to that in section 14-15-14(1)(b) of the Adoption Act was said to create a "relationship of parent or parents and child . . . as against all the world."[67] In that case, the court allowed the decedent's adopted grandchildren to inherit their adoptive parents' shares under the adoptive parents' mother's will in accord with an anti-lapse statute.[68] While this decision may be helpful, it is not compelling. The anti-lapse provision merely provided for a substitute legatee, and so it could be said that even in *Hoellinger* the adopted children were inheriting *from* their parents, not *through* them; the "all the world" language is thus dictum.

A more accurate example of the problem would be where A dies intestate without wife or issue, survived only by his brother, B, and an adopted child, D, of A's brother C. Under the Adoption Act, B could argue that while the Act provides for the parent-child relationship between C and D, it does not speak to the relationship between A and D. Since adoption was unknown to the common law, the status of the relationships of an adopted person to his adoptive parent and the parent's relatives are determined by statute. Strictly inerpreting section 14-15-14(1)(b) of the Adoption Act,[69]

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64. N.D. CENT. CODE § 14-15-14(1)(b) (1971) seems, initially at least, to place adopted children in the same position as natural children would be for purposes of inheritance.

65. N.D. CENT. CODE § 14-15-14(1)(b) (1971).

66. Hoellinger v. Molzhon, 77 N.D. 108, 41 N.W.2d 217 (1950).

67. *Id.* at 220. The adoption statute in effect at that time stated that the adopted child "shall be deemed, [the child of the adoptive parent] as respects all legal consequences and incidents of the natural *relation of parent and child.*" N.D. REV. CODE § 14-11-13 (1943) (emphasis added).

68. N.D. CENT. CODE § 56-04-20 (1972).

69. The common law rule of strict interpretation of statutes in derogation of the common law is not applicable to the Century Code. N.D. CENT. CODE § 1-02-01 (1959).

there is no declaration of D's relationship to A. Thus, he may not be entitled to inherit from A, the *Hoellinger* case notwithstanding.

There is no similar problem with the Adoption Act in considering inheritance by the adopted person from or through his *natural* parents. The Adoption Act is clear on this point: "All legal relationships between the adopted individual and his relatives" are terminated and he "thereafter is a stranger to his former relatives for all purposes including inheritance."[70] It is evident that this section does not have the possibility of misinterpretation that is present under subsection (b).

The Code provides a solution by specifically stating that the adoption of a person grants him the right of inheritance by, from and through his adoptive parent.[71]

The Code also severs all legal relationships between the adopted child and his natural parent,[72] with the obvious exception of where a stepparent adopts his spouse's natural child.[73] Unfortunately, the Code makes no reference to the status of the child's relationship with his *other* natural parent in this situation.[74]

A problem related to inheritance by adopted children is the status of children born out of wedlock. At common law, bastards could not inherit since they were *filius nullius* (no one's child).[75] By statute in most jurisdictions they may now inherit from their natural mother and in certain instances from their natural father. Typically, the child was in all cases considered the heir of his mother; he was heir to his father only where the father acknowledged paternity by witnessed written instrument.[76] The term "heir,"

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70. N.D. CENT. CODE § 14-15-14(1)(a) (1971) (emphasis added).

71. N.D. CENT. CODE § 30.1-04-09 (effective July 1, 1975).

72. N.D. CENT. CODE § 30.1-04-09(1) (effective July 1, 1975). This inconsistent with the Adoption Act. N.D. CENT. CODE § 14-15-14(1)(a) (1971).

73. N.D. CENT. CODE § 30.1-04-09(1) (effective July 1, 1975).

74. In certain instances it is not necessary that both parents consent to an adoption (see N.D. CENT. CODE §§ 14-15-05, 14-15-06 (1971)). Thus it would be possible for a child to be adopted by his natural mother's spouse and be legally severed from any possibility of inheriting by, from or through his natural father in spite of the fact that neither the child nor his natural father has consented to the adoption.

75. ATKINSON, WILLS 40 (2d ed. 1953).

76. The North Dakota statute relating to inheritance by illegitimates was, until 1969, typical:

> Inheritance by child born out of wedlock.—Every child born out of wedlock is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child. In all cases such child is an heir of his mother. He inherits the father's or mother's estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. He, however, does not represent his father or mother by inheriting any part of the estate of the kindred of his father or mother, either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage shall have acknowledged him as his child or adopted him into his family. In that case such child and all the legitimate children in such family are considered brothers and sisters and on the death of any one of them intestate and without issue the others, subject to the rights in the estate of such deceased child of the father and mother, respectively, as is provided in this code.

was used in a limited sense, however, in that the child was not the heir of his mother or acknowledged father with respect to inheritance "of the estate of the kindred of his father or mother" unless they had inter-married and his father "adopted him into his family" or acknowledged him.[77]

Essentially there are two problems with this type of statute. First, the illegitimate child is discriminated against because he must satisfy two conditions before being placed in the same status as legitimates for the purpose of inheriting *through* his parents. Second, they allow a father to openly acknowledge an illegitimate child at any time, even after that child's death prior to the death of the father, allowing the father to take as an heir even though he refused to acknowledge the child as his during his lifetime.[78]

The first problem was constitutionally fatal to the North Dakota statute. In 1968 in *In re Estate of Jensen*,[79] the North Dakota Supreme Court held the North Dakota statute unconstitutional as a violation of equal protection[80] because it discriminated invidiously between legitimates and illegitimates.[81] Subsequent to *Jensen*, the North Dakota Legislature revised and reenacted the North Dakota statute to conform to the *Jensen* decision.[82] Both problems previously mentioned would seem to have been solved by the revised statute: illegitimates were expressly permitted to inherit not only from their natural parents but also from collateral and lineal heirs of their parents. Also, the statute did away with any requirement of written acknowledgment of paternity; thus, illegitimates were to be considered as the natural children of their parents for inheritance purposes. As a result of *Jensen* and the revised statute, North Da-

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> inherit his estate as his heirs in the same manner as if all the children had been born in wedlock. The issue of all marriages null in law or dissolved by divorce are deeemd to have been born in wedlock.

N.D. CENT. CODE § 56-01-05 (1960).

77. Thus, in no way could the illegitimate inherit *through* his parents without two requirements first being saisfied: 1) his parents must have intermarried; *and*, 2) his father must have acknowledged him.

78. It would be unusual for a father who was unwilling to acknowledge his illegitimate child during that child's life to acknowledge the child after his death; unusual only because seldom would the child leave an estate of sufficient substance to make such acknowledgement worthwhile. Nonetheless, it is an act which should not be given support by the state.

79. *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968).

80. The court held N.D. CENT. CODE § 56-01-05 unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Section 20 of the North Dakota Constitution. *Id.* at 879.

81. The court based its decision on the 1968 United States Supreme Court case of Levy v. Louisiana, 391 U.S. 68 (1968) which held that denying illegitimates the right to sue in wrongful death actions was a violation of their right to equal protection of the law.

82. The statute now reads:

> Inheritance by child out of wedlock.—Every child is hereby declared to be the legitimate child of his natural parents, and is entitled to support and education, to the same extent as if he had been born in lawful wedlock. He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. The issue of all marriages null in law or dissolved by divorce are deemed to have been born in wedlock.

N.D. CENT. CODE § 56-01-05 (1972).

kota had perhaps a more enlightened and progressive attitude towards illegitimates than any other state.

It is in this one area that the Uniform Probate Code is a regressive step for North Dakota. Under the Code,[83] for the purpose of inheritance, the child born out of wedlock is the child of his mother, but is the child of the father *only* if the parents have gone through a marriage ceremony,[84] or if paternity is established by adjudication.[85] Presumably, a written acknowledgment is not satisfactory since the Code speaks expressly of "adjudication."[86] In this regard, the Code section is not only regressive when compared with the revised statute but is not much better than the statute declared unconstitutional in *Jensen*. The only factor in favor of the Code section is the provision that the paternity adjudication is ineffective to qualify the father (or his kindred) to inherit from or through the child without an open acknowledgment by the father of paternity.[87]

While the Code provision would likely meet the constitutional test of *Jensen*, it is certainly not a progressive step for North Dakota.[88]

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83. N.D. CENT. CODE § 30.1-04-09(2) (effective July 1, 1975).

84. Whether the marriage is valid, voidable or void is of no importance as long as the couple has attempted to become married. N.D. CENT. CODE § 30.1-04-09(2)(a) (effective July 1, 1975).

85. N.D. CENT. CODE § 30.1-04-09(2)(b) (effective July 1, 1975). Paternity is established by adjudication prior to the father's death or, if after the father's death, by clear and convincing proof.

86. It is likely that if the paternity issue is in question after the father's death, a written acknowledgment will satisfy the "clear and convincing" requirement.

87. N.D. CENT. CODE § 30.1-04-09(2)(b) (effective July 1, 1975). The reason for this provision is to prevent the reluctant father from reaping a benefit without recognizing his obligation to the child. *See* note 78 *supra*.

88. *Jensen* is likely to be a lonely decision. Three years after the North Dakota Supreme Court rendered the *Jensen* decision, the United States Supreme Court had the opportunity in Labine v. Vincent, 401 U.S. 532 (1971) to review the constitutionality of a statute similar to that considered in *Jensen*. The Court, speaking through Mr. Justice Black, refused to hold the statute a violation of the Equal Protection Clause stating that the laws relating to intestate succession and its regulation were of major state concern. *Id.* at 537.

Recently, however, the Court may have retreated from this position. In Gomez v. Perez, 93 S. Ct. 872 (1973) citing *Levy* but making no reference to *Labine*, the Court held that " a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.* at 875. Granted, the *Gomez* case was dealing with the problem of illegitimates in the context of the duty of natural parents to support, but the opinion would seem broad enough for application to the *Labine* and *Jensen* situations.

In any event, even though the Court in *Labine* held a statute similar to the Code section pertaining to illegitimates as not in violation of the Equal Protection Clause of the United States Constitution, that decision, of course, has no effect on the *Jensen* decision holding a similar statute in violation of Section 20 of the North Dakota Constitution. Thus there is a possibility that a North Dakota court relying on the rationale of *Jensen* would declare section 30.1-04-09 an unconstitutional violation of Section 20 of the North Dakota Constitution.

VI. ADVANCEMENTS UNDER THE CODE

An advancement is a gift in anticipation of what a child or other lineal descendant will be entitled to at the death of the decedent dying intestate.[89] When a gift is determined to have been an advancement, the recipient of that gift must take it into account as part of his share. The process by which this is done is called "hotch-pot," a bookkeeping maneuver which consists of adding the amount of the advancement to the total of the estate, dividing by the number of shares into which the estate is to be divided, and then reducing the share of the recipient of the advancement by the amount that his share was anticipated by the advancement.

Whether a transfer prior to the death of a North Dakota intestate is an advancement is covered by statute.[90] This pre-Code statute classifies a gift as an advancement only where such intent was expressed in the gift itself, or charged in writing by the donor, or acknowledged in writing by the recipient.[91] Under the Code, a gift is an advancement when declared so in a writing executed contemporaneously with the gift or when the recipient states in writing that the gift is merely in anticipation of his intestate share of the decedent's estate.[92]

A significant difference between the prior law and the Code is that the prior law speaks of advancements only in regard to children or other lineal descedants[93] while the Code refers to "heirs."[94] Thus, any person entitled to take a part of the decedent's estate under the scheme of intestate succession[95] who has received an advancement must, if he wishes to participate in the distribution of the estate, allow his advancement to be accounted for in determining his share.

Another distinction between the prior law and the Code relates to the advancement of a recipient who predeceases the decedent. Under prior law, the representatives of the deceased recipient were to account for his advancement.[96] The Code, however, does not take this into account in computing the share which the recipient's children may take unless the contrary intent is evidenced in the contemporaneous declaration or the acknowledgment.[97]

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89. ATKINSON, WILLS § 129 at 716 *et seq.* (2d ed. 1953).
90. N.D. CENT. CODE § 30-21-14 (1960).
91. *Id.*
92. N.D. CENT. CODE § 30.1-04-10 (effective July 1, 1975).
93. N.D. CENT. CODE § 30-21-12 (1960). This itself is an extension. Most advancement statutes apply only to children. IV VERNIER, AMERICAN FAMILY LAWS § 239 at 114-15 (1936).
94. N.D. CENT. CODE § 30.1-04-10 (effective July 1, 1975). An "heir" is defined by the Code as referring to collaterals and the surviving spouse as well as children and lineal descendants. N.D. CENT. CODE § 30.1-01-06(18) (effective July 1, 1975).
95. N.D. CENT. CODE § 30.1-04-01, 02, 03 (effective July 1, 1975).
96. N.D. CENT. CODE § 30-21-16 (1960).
97. N.D. CENT. CODE § 30.1-04-10 (effective July 1, 1975).

VII. TESTAMENTARY EXECUTION UNDER THE CODE

The Code has made some changes in the availability and ways of executing wills in North Dakota. The Code greatly simplifies the execution of wills by reducing the formalities to a minimum.[98] The Code makes no requirement that the testator "declare" or "publish" the document as his will; neither must he request the witnesses to sign nor must they witness it in the presence of the testator or of each other. Further, the requirement that a testator's signature be "at the end thereof" is no longer included.[99]

There is no Code provision allowing for the valid execution of an oral or nuncupative will.[100] Typically, nuncupative wills are strictly limited by statute.[101] While there has not been much litigation regarding oral wills, it has often been said that they are disfavored by the law and that statutes allowing them should be strictly limited.[102] There is little possibility that the absence of a provision allowing for nuncupative wills in the Code will have much effect. There has never been litigation in a North Dakota court of record in reference to the validity of a nuncupative will.[103] The relatively infrequent use of these wills, plus the fact that formal written wills may be executed with relatively little formality under the Code, justifies the failure to provide for oral wills.

The Code does allow for the execution of holographic, or handwritten, unwitnessed wills. Statutes providing for holographic wills have, because of the exceptional nature of this form of testament, been strictly interpreted. Thus, where a statute requires that the will "be entirely written, dated, and signed by the hand of the testator,"[104] those requirements must be strictly followed. The Code somewhat liberalizes these requirements by providing that only the testator's signature *and the material provisions* of the will must be in the testator's own hand.[105] Under the Code, a holographic will would not be invalid because of a mechanically applied date or because it happened to contain the signature of a witness. It would

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98. N.D. CENT. CODE § 30.1-08-02 (effective July 1, 1975).
99. *Id.*
100. Prior to the Code, North Dakota provided for oral wills. N.D. CENT. CODE § 56-03-03 (1960).
101. The North Dakota statute prior to the Code relating to nuncupative wills was typical. It did not allow the value of the estate bequeathed to exceed $1,000 and it had to be proved by two witnesses who were present at the making of the will. Additionally the will was valid only if the decedent was in military service in the field in actual contemplation, fear or peril of death; doing duty on shipboard at sea in actual contemplation, fear or peril of death; or in expectation of immediate death from an injury received that same day. N.D. CENT. CODE § 56-03-03 (1960).
102. *In re* Taylor's Estate, 56 Ariz. 211, 106 P.2d 492 (1940); Godfrey v. Smith, 73 Neb. 756, 103 N.W. 450 (1905).
103. Which of course is not to say that some testators have not utilized this device.
104. N.D. CENT. CODE § 56-03-04 (1972).
105. N.D. CENT. CODE § 30.1-08-03 (effective July 1, 1975).

seem that the Code would allow as a valid holograph, the typical printed form will filled in by the testator in his own hand, since the testator would have provided, the "material provisions" himself.

The Code provides that a formal will may be "self-proved" either at the time of execution or later, by a notarized acknowledgment by the testator and affidavit of witnesses.[106] The effect of the self-proving process is to indicate conclusively the compliance with the signature requirements and to prove presumptively all the other requirements of execution.[107]

Because of the possibility of fraud, at common law a witness who had a financial interest in the will was incompetent.[108] Incompetency of one of the prescribed number of competent witnesses prevented valid execution; this was true even if the interested witness later renounced his gift under the will. Many jurisdictions now allow or require an interested witness to give up his gift[109] or at least that portion in excess of what the witness would take if the will were declared invalid.[110] The Code recognizes the questionable effect of such statutes and specifically provides that a will is not invalid because of a witness' interest.[111]

This section may be the subject of future interpretive litigation. It could be determined that it means an interest at the time of execution, effectively forcing the witness to give up his gift as was required under prior law.[112] The official comment to the Code, however, states that this section does *not* forfeit a gift to an interested witness.[113]

VIII. CONCLUSION

This article has touched on only a few of the areas of the substantive law affected by the enactment of the Uniform Probate Code in North Dakota. The Code itself covers many other areas of reform; these include probate and administration procedures, protection of persons under legal disability, non-probate transfers of property and trust administration. The omission of these areas from this analysis stems more from the exigencies of time and inclination than their lack of effect on North Dakota law; on the contrary,

106. N.D. CENT. CODE § 30.1-08-04 (effective July 1, 1975).
107. N.D. CENT. CODE § 30.1-15-06(2) (effective July 1, 1975).
108. ATKINSON, WILLS 309 (2d ed. 1953).
109. Typical was N.D. CENT. CODE § 56-04-21 (1972) prior to adoption of the Uniform Probate Code.
110. N.D. CENT. CODE § 56-04-22 (1972).
111. N.D. CENT. CODE § 30.1-08-05(2) (effective July 1, 1975).
112. N.D. CENT. CODE § 56-04-21 (1972).
113. UNIFORM PROBATE CODE § 2-505, comment at 49.

there are many changes in these areas which should be brought to the attention of the Bar. Hopefully, in the two years before the Code becomes effective, comprehensive analyses of these problem areas will be forthcoming.