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THE TREATMENT OF SOME TRADITIONAL PROBLEMS OF INTESTATE SUCCESSION IN THE NORTH DAKOTA CENTURY CODE

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Some of the provisions of the North Dakota Century Code as well as some collateral developments in sister states are capable of generating considerable confusion in the distribution of intestate estates. Since North Dakota has had relatively little litigation in this area, its solutions to the problems are unclear, and the purpose of this article is to analyze some of the alternatives available to the practitioners and judges faced with a problem for which there is no clear precedent. The following commentary may also be useful to those engaged in estate planning, where the law of intestate succession is sometimes relied upon for disposition of an estate after the testator's specific requirements have been met.

I. THE SHARES OF LINEAL AND COLLATERAL KINDRED—PER STIRPES AND PER CAPITA DISTRIBUTION

The proper method of distributing an estate among lineal and collateral kindred has been extensively debated in the courts of other jurisdictions. The discussion has centered on whether the proper method of dividing the estate is *per stirpes* or *per capita*, and if *per stirpes*, what the root generation must be.[1] Distribution *per stirpes* involves distributing the estate by strictly dividing the property according to the number of people contained in the root generation, and preserving that allocation within each branch of the family. The "root generation" is that generation which determines the number of *equal* shares into which the estate will be divided, and in the case of strict *per stirpes* distribution is always the generation closest to the decedent, children or brothers and sisters, whether or not that generation has living members.[2] Thus if A dies survived by no spouse and by three sons and the issue of

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1. An excellent discussion of the matter can be found in Ingram and Parnall, *The Perils of Intestate Sucession in New Mexico and Related Will Problems*, 7 NAT. RES. J. 555 (1967).

2. *Id.*

a predeceased child, his estate is divided into four parts, one of which is given to each son and one of which is given to the issue of the predeceased child. The issue of the predeceased child are said to take "by representation," *i.e.* representing their deceased ancestor and taking the share he would have taken had he survived the decedent. This result surprises no one and is automatically reached under almost every statute. The harder case is presented when W is predeceased by all of his children, and two or more of them have children in varying numbers. Thus we reach the following situation, where W dies and is predeceased by all three of his children, X, Y and Z, but is survived by four children of Y, two children of Z, and no issue of X. Even in jurisdictions which generally distribute *per stirpes*, we reach the problem of where to establish the root generation. If the root generation is taken to be W's children, X, Y and Z, even though they all predeceased W, then the estate is divided into two parts, and each of Y's children takes one-eighth and each of Z's children takes one-quarter. Members of the root generation who predecease the decedent leaving no surviving issue are not included in the computation in *any* system we will discuss. Thus X is ignored in our example. This pattern of distribution is used in jurisdictions which still adhere to the strict interpretation of *per stirpes* distribution.[3]

The problem with the strict *per stirpes* solution is that it imposes an unequal distribution among people who are otherwise equal. We have no reason to create a legal presumption that W loved any of his grandchildren less than any of the others, or that if he had expressed himself he would have distributed his bounty unequally among them. The result is that the courts in this country early evinced a tendency to use as the root generation the first generation having members living, in the last example the grandchildren.[4] Thus instead of having a pure *per stirpes* system which would have divided the shares always at the level of the decedent's children, we frequently find a modified *per stirpes* system which skips all generations down to the first having members. This system we may call the modified *per stirpes*,[5] although where that rule exists it is merely referred to as taking *per stirpes* or "by representation" as though there were no modification.

Because of the confusion caused by the judicial straining on this issue many states attempted early to clarify the matter by statute, and the result was frequently a statute which specified in

3. *See* the citations, *id.* at 577.
4. *See In re* Martin's Estate, 96 Vt. 455, 120 A. 862 (1923); Knapp v. Windsor, 6 Cush. (Mass.) 156 (1850); 2 KENT, COMMENTARIES, 425 (12th ed. 1896).
5. The terminology for these various systems may be found in a number of sources, but the author has relied on Ingram & Parnall, *supra* note 1, for his source.

some manner that if all descendants were of the same generation, they took *per capita* (*i.e.*, each took an equal share), but if they were of different generations, they took *per stirpes*.[6] A clear exposition of the modified *per stirpes* method is found in the Model Probate Code, and reads as follows:

> Meaning of representation. "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All distributees except those in the nearest degree are said to take by representation.[7]

Unfortunately, in attempting to enact statutes which were probably trying to reach the result attained by the Model Probate Code, the legislatures frequently left their language unclear, and the result was language such as the following:

> [I]f there is no child of the 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. . . .[8]

The above language is taken from the California Code, but is shared by various other states.[9] It has given rise to various interpretations, but the most grotesque is the California doctrine expressed in the case of *Maud v. Catherwood*.[10] There the decedent had created an *inter vivos* trust, the corpus of which was to be distributed upon the death of his last surviving child. Upon the death of that child,

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6. *See, e.g.*, the states adopting the Field Code, CAL. PROBATE CODE § 221; IDAHO CODE § 14-103(1); N. D. CENT. CODE § 56-01-04(b); MONT. REV. CODE § 91-403(1); S. DAK. CODE OF 1939 § 56.0104(1); *see also* a non-Field Code state, MASS. GEN. LAWS ANN. ch. 190 § 3(1).

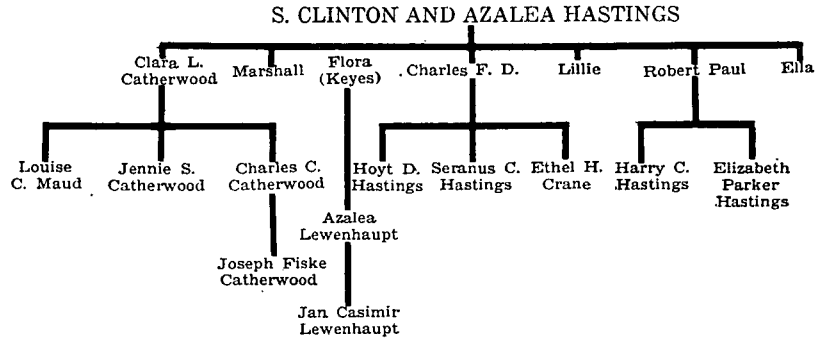
7. MODEL PROBATE CODE § 22(c) (1946).

8. CAL. PROBATE CODE § 221.

9. *See* the Field Code states listed *supra* note 6.

10. 67 Cal. App. 2d 636, 155 P.2d 111 (Dist. Ct. App. 1945).

the surviving lineal descendants were those underlined on the chart below:[11]



A strict *per stirpes* distribution in this situation would result in the estate being divided into four equal shares, with Jan Casimir Lewenhaupt and Ethel H. Crane each taking one share, or one quarter of the estate, and the others each sharing a full share (in the actual case, each of the others takes one eighth). Marshall, Lillie and Ella, of course, are ignored since they were predeceased without surviving issue. Harry Hastings, Elizabeth Hastings, and Louise Maud could point out that they were one step closer to the decedent than Jan Casimir Lewenhaupt, and that there was no reason to assume that the decedent intended any such discrimination among his issue. They therefore contended that the root generation should be their own, that of the grandchildren, rather than the children, and that the estate should be divided into six equal parts, each claimant taking one. That result, of course, would be reached in a state having a modified *per stirpes* doctrine. The California Appellate Court felt that the language of the statute, quoted above, dictated that *per capita* distribution be used *only* when all heirs were of the same degree of kinship to the decedent, and that when some takers were of different degree the system reverted to a pure *per stirpes* computation with the root generation being that of the decedent's children. This result has been called a strict *per stirpes* rule with a *per capita* exception.[12] Having reviewed the general patterns of treatment of this question, we can now turn specifically to the North Dakota treatment of the subject. Here we find that far from attempting to provide any guidance to the bar as to which method to use, the statute completely obscures the issue by providing no less than three different treatments of the subject. Section 56-01-04 (1) (a) provides:

1. If the decedent leaves:
   a. A surviving husband or wife and only one child, or

11. *Id.* at 640, 155 P.2d at 115.
12. Ingram & Parnall, *supra* note 1 at 574-76.

> the lawful issue of one child, in equal shares to the surviving husband or wife and child, or the issue of such child. . . ."

This section provides no guidance whatsoever as to whether the distribution should be *per capita* or *per stirpes*. The issue will arise, of course, only if the surviving issue are great-grandchildren or more remote, but such cases are not unknown, and it would be helpful to know what the legislature intended.

Section 56-01-04 (1) (b) deals with the situation where the decedent is survived by a wife and more than one child and the issue thereof. In this section the operative language is nearly identical to that of the California statute involved in *Maud v. Catherwood*:

> [T]o the child or children living and to the lawful issue of any deceased child by right of representation, but if there is no child of the decedent living at the time of death, the remainder goes to all of the decedent's lineal descendants, and if all such descendants are in the same degree of kindred to the decedent, they share equally, but otherwise, they take according to the right of representation. . . .

This provision would seem to demand the *Maud v. Catherwood* solution if interpreted literally, but we shall deal with that question later.

Section 56-01-04 (1) (c) deals with the situation where there is no surviving spouse, and reads:

> [I]f such issue consists of more than one child living, or of one child, or more than one child, living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child or children living and the issue of the deceased child or children by right of representation, but if the decedent's child or children shall be dead, but shall have left issue, all the estate goes to such issue by right of representation. . . .

This provision seems to require a strict *per stirpes* distribution.

Finally, the legislature apparently made some attempt to clarify the subject by defining taking by representation:

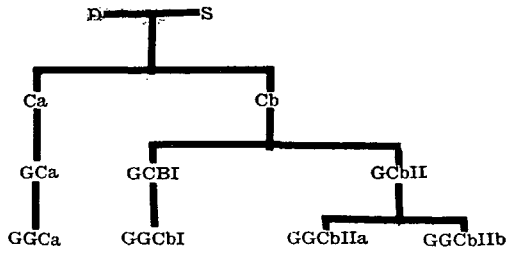
> 56-01-13. "Inheritance by right of representation" defined—Status of posthumous children.—Inheritance of succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living.

Taken together, these statutes make a complete hash of the

subject. As we have already noted, subdivision (a) provides no guidance whatsoever. Subdivision (b) seems to admit of a *Maud v. Catherwood* treatment, and subdivision (c), read literally, seems to demand a strict *per stirpes* rule. Section 56-01-13 does not aid us in our quest for enlightenment, for on its face it appears to mean nothing at all.

To clarify the last statement first, section 56-01-13 really does not define representation very clearly. If all of the heirs are grandchildren, this section seems to indicate that they must take *per stirpes,* not *per capita,* even though they are of the same degree of kinship, whenever the statute speaks in terms of representation. When we go beyond the level of grandchildren, however, to great-grandchildren and beyond, the statute is of no help at all. Thus if all heirs are great-grandchildren, all that we know is that each takes the share his parent would have taken had the parent survived the decedent. Although this language is not very helpful at first glance, judicial interpretations have been placed upon it, which are discussed below, which make it quite important in discussing the other provisions.

If the above reasoning is correct, we are then forced to reach an absolutely grotesque result if we interpret literally subdivisions (a), (b), and (c). Let us take a family consisting of D, decedent, S, spouse, children Ca and Cb, one child of Ca, Gca, two children of Cb, GCbI and GCbII, child of Gca, GGCa, child of GcbI, GGCbI, and two children of GCbII, GGCbIIa and GGCbIIb. The situation is diagrammed below:



First, for example 1, let us assume that Ca and all his issue and Cb, GCbI and II all predecease D. If S survives, the estate will be distributed under subdivision (a). At this point we have reached the first anomaly. Until 1963, subdivision (b) provided that the surviving spouse received one-third of the estate if the deceased were survived by two or more children or their issue, whereas subdivision (a) provided that the surviving spouse would receive one-half if the deceased were survived by only one child or the

issue of one child. In 1963 subdivision (b) was amended to increase the share of the surviving spouse to one-half when the deceased was survived by two or more children or their issue.[13] With that amendment the difference in treatment of the surviving spouse in the two subdivisions disappeared, as did the reason for having two subdivisions; but although under either subdivision the surviving spouse gets one-half and the issue get one-half, the subdivision under which distribution is effected is still determined by the now irrelevant number of surviving children or issue thereof. Subdivision (a) clearly should have been repealed at the time of the amendment to subdivision (b), and all reference to number of children or issue thereof surviving should have been deleted from subdivision (b).

As the matter now stands, in Example 1 distribution will be effected under subdivision (a). S will therefore receive one-half, and GGCbI, GGCbIIa and GGCbIIb will split the other half between them. But how? The subdivision is silent on the point. If the distribution is *per stirpes*, GGCbI will take one quarter and the others one eighth each; if *per capita*, each takes one sixth. The subdivision is absolutely silent as to which method to choose, so one might be tempted to say that we must interpret the subdivision in such a way as to achieve results parallel to those achieved by the other subdivisions. We therefore turn to subdivision (b).

In order to invoke the aid of subdivision (b), we will create Example 2 and revive someone in the collateral branch of the family, so GGCa is resurrected. Now we have four great grandchildren and a spouse surviving. Subdivision (b) is limpidly explicit: each great grandchild takes one-eighth. This seems to be a felicitous result. There would be no reason to create a presumption that the decedent loved one great grandchild more or less than another. If he did have a preference he could easily have made a will. Let us treat equals as equals. Now for Example 3 let us assume that only the four great grandchildren survive, that the spouse predeceased the decedent. Subdivision (c) governs, and the operative language is "(A)ll the estate goes to such issue by right of representation. . . ." Now GGCa gets one-half, GGCbI gets one-fourth, and the remaining two great grandchildren get one-eighth each. It is interesting that the law makes the touchstone for equal treatment of issue of equal degree the completely irrelevant factor of the survival of a spouse. For Example 4 the spouse is revived again. Subdivision (b) governs. But let us also revive GCbI. In this situation the heirs are now of unequal degrees of kindred, and we are back with a *Maud v. Catherwood* situation. If we follow the

13. Sess. Laws 1963, ch. 371, § 1.

specific language of the statute, GGCa takes one-fourth, GCbI takes one-eighth, and GGCbIIa and GGCbIIb each take one-sixteenth. A great grandchild thus takes twice as much as the only surviving grandchild, who is one kindred step closer to the decedent, and four times as much as the other great grandchildren. Thus by the terms of subdivision (b) equal taking by equals is made to hinge on all heirs being of the same generation, which is surely an irrelevant factor.

All one can do in looking at these provisions is to agree with Dickens' Mr. Bumble that "If the law supposes that . . . the law is a ass . . . ."[14] The least we should expect of such a statute is uniform treatment in all cases provided for under subdivisions (a), (b) and (c). The ideal way to accomplish this, of course, would be by legislative revision. Pending such revision, however, we can at least try to see if the courts have any basis for interpreting these statutes in such a fashion as to achieve fair and uniform results.

In interpreting these provisions, we have two major problems: (1) interpreting the provisions of subdivision (b) so as to avoid a *Maud v. Catherwood* result, and (2) interpreting subdivisions (b) and (c) so as to achieve parallel results under their differing provisions. If these ends can be accomplished, there would seem to be no bar to interpreting the totally indefinite provisions of subdivision (a) to conform to the other two.

It is desirable to avoid reaching the result obtained in *Maud v. Catherwood* because that case reaches a result which is inequitable and which is not dictated by any logical necessity. In both *Maud v. Catherwood* and in the example used above, reverting to a *per stirpes* distribution any time the heirs are of different generations resulted in heirs of a closer degree of kindred taking less than those of a more distant degree. Since those of a nearer degree are more likely to have known the decedent and to have been held in affection and esteem by him, any artificial presumption which can result in the nearer degree taking less than a more distant degree should be discouraged. Furthermore, it is a clear policy of the law of decedents' estates that the nearer should take before the more distant.

In light of the above policy arguments, it may be possible to interpret the North Dakota Century Code to avoid reaching the California result. Although the specific language of the North Dakota Code seems to dictate this result, and it is the result reached by the California courts on the basis of identical language, other courts, notably in Massachusetts, interpreting statutes with strongly sim-

14. DICKENS, OLIVER TWIST, ch. 51.

ilar language, have managed to reach a result which results in distribution *per capita* to the first generation with members living.[15]

The factor militating in favor of North Dakota's adopting the Massachusetts construction is the existence of section 56-01-13, defining taking by representation as taking the share the predeceased parent would have taken had he survived the decedent. The California statute defining taking by representation in *Maud v. Catherwood* was phrased differently: "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."[16] This statute automatically, in the case of direct descendants, seems to place the root generation at the level of the children of the decedent.

Section 56-01-13, however is substantially identical to the definition of taking by right of representation in force in Massachusetts at the time of the decision in *Balch v. Stone*.[17] That case involved the interpretation of language substantially similar to that of subdivision (b) and thus also substantially similar to the California statute on the same subject. The Massachusetts court managed to interpret its statute as always requiring the root generation to be the first generation with living members, with the issue of predeceased members of such generation taking by representing their ancestors in the root generation. This interpretation, of course, stretches the subdivision (b) language quite a bit. It was achieved partially on the basis of Massachusetts legislative history which is, of course, irrelevant in North Dakota; but it was also based on the language of the Massachusetts equivalent of section 56-01-13. The Massachusetts court reasoned that by the plain language of the statute, if the parents of the younger generation had all survived, the parents would have taken *per capita*, since all heirs would then have been of the same generation.[18] Thus under the Massachusetts definition of "representation" as taking the parent's share, each child takes *per capita* because his parent would have taken *per capita*. The Massachusetts court thus managed to hold that using any root generation save the first generation with living members would prevent the younger members from taking *per stirpes* as dictated by the statute.

15. Snow v. Snow, 111 Mass. 389 (1873); Knapp v. Windsor 6 Cush. (60 Mass.) 156 (1850); Balch v. Stone, 149 Mass. 39, 20 N.E. 322 (1889). The court in *Maud v. Catherwood* found it necessary to consider and distinguish *Balch v. Stone*.

16. CAL. PROBATE CODE § 250.

17. 149 Mass. 39, 20 N.E. 322, 325 (1889), interpreting Mass. Pub. Stat. Ch. 125, § 6: "[I]nheritance or sucession by right of representation shall be deemed to take place when the descendants of a deceased heir take the same share or right in the estate of another person that their parents would have taken if living."

18. 149 Mass. at 498, 20 N.E. at 325 (1889).

While one can only agree with the Massachusetts court's statement that there are difficulties with this interpretation (*e.g.*, it is still viable when dealing with heirs two generations apart, such as grandchildren and great great grandchildren), it seems permissible to do at least this amount of stretching to achieve the more equitable and uniform Massachusetts result.

Under these circumstances, it would appear that the North Dakota courts are justified in adopting the Massachusetts interpretation as a matter of *stare decisis*, however to the extent that the North Dakota language is drawn from the Massachusetts statute we may also argue that the North Dakota legislature adopted the Massachusetts judicial interpretation along with the language.[19]

The question then becomes whether subdivision (c) can be interpreted in such a fashion as to achieve a parallel result. It is extremely desirable to interpret the two subdivisions in parallel fashion so we can achieve the same method of distribution under each, regardless of whether the spouse survives or not.

There appears to be authority for interpreting subdivision (c) to achieve the same result as subdivision (b). Although a strict *per stirpes* rule would supposedly not permit *per capita* distribution at any point, courts in this country early decided that strict *per stirpes* distribution would be avoided whenever possible, and that the root generation would always be the first generation with members living, even though the statute involved adhered to the language of strict representation.[20] While it would be possible to question the authority on which these early cases rest,[21] the rule is now clearly established in many jurisdictions, and could easily serve as the authority for introduction of a similar doctrine here. If such reasoning were to triumph, we would at least have achieved the same results under both subdivisions.

To recapitulate, if the interpretations recommended above are adopted under each subdivision the determination of whether to distribute *per capita* or *per stirpes* will be governed exclusively by the degree of kindred of the heirs. If they are not all of the same degree, the root generation will be the closest generation to the

19. *See* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5209 (3rd ed. 1943). The exact extent to which the North Dakota provision was drawn from the Massachusetts statute is difficult to estimate, however the almost identical language and the chronological precedence of the Massachusetts statute would lead one to believe that there was some connection between that and the Field Code. Attempts at codification in Massachusetts may to some extent have inspired David Dudley Field. See Fisch, *Civil Code; Notes for an Uncelebrated Centennial*, 43 N. DAK. L. REV. 485 (1967).

20. *See* authorities cited *supra* note 3.

21. KENT seems to think that this interpretation is buttressed also by British authority, but a subsequent British case seems to refute this view. *In re* Ross' Trusts, L. R. 13 Eq. 286 (1871). Some of the confusion seems to result from a failure to distinguish between the rules applicable to collaterals and those applying to issue. The Statute of Distribution clearly and explicitly applies a modified *per stirpes* rule to collaterals, but not to issue. Compare section V with section VI, 22 & 23 Car. II, ch. 10 (1670).

decedent having living members. All members of that generation will take *per capita*. All other heirs will take by representing their ancestors in the root generation.

The effect of such an interpretation would be to construe the Code as providing for modified *per stirpes* distribution in all cases. Thus in interpreting subdivision (b), when all of the issue are of the same generation, Example 2 above, they take *per capita*, the same result reached in Example 2. In Example 4, however, with the spouse, one grandchild, GCbI, and three great grandchildren surviving, the root generation would be that of the grandchildren, and the distribution would be: GGCa one-sixth, GCbI one-sixth, and GGCbIIa and GGCbIIb one-twelfth each. In Example 3, under subdivision (c), with only four great grandchildren surviving, the root generation is that of the great grandchildren, and each takes one-fourth. Subdivision (a) will be interpreted to achieve parallel results, so that in Example 1 each great grandchild would take one-sixth.

II. THE ILLEGITIMATE CHILD

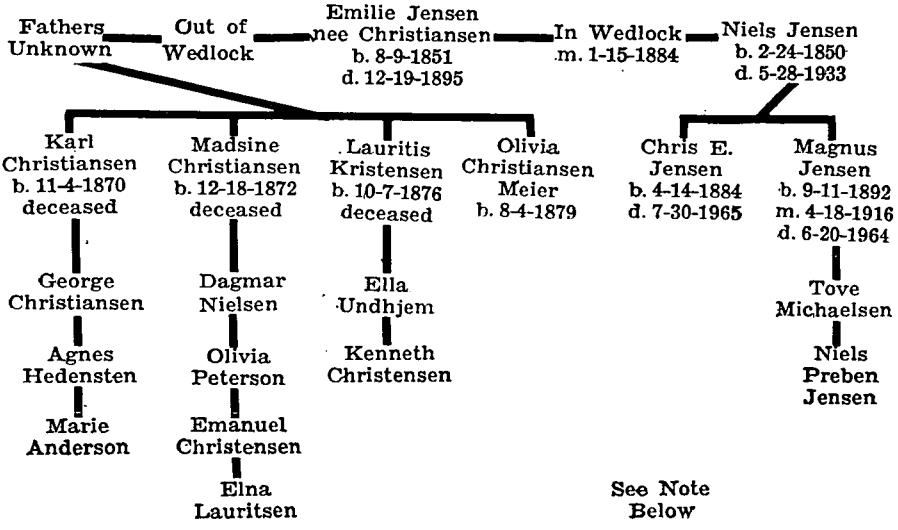
The status of the illegitimate child has improved vastly since the days when the Common Law treated him as "filius nullius," the child of no one. Former North Dakota Century Code section 56-01-05 was typical of many of the modern statutory provisions on the subject:

> 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, inherit his estate as his heirs in the same manner as if all the children had been born in wedlock.

Although more humane than the Common Law, the above provision still discriminated against the illegitimate; he could not inherit

from his father unless his father legitimated him, and he could not inherit from anyone besides his father and mother unless they married.

GENEALOGICAL CHART



NOTE: In addition to the two sons shown, Emilie Christiansen Jensen also bore a legitimate daughter to Niels Jensen, Dagmar Marie Magdalene Jensen, b. May 30, 1887, d. June 28, 1890.

Matters remained at this stage until the recent decision of the North Dakota Supreme Court in the case of *In re Estate of Jensen*.[22] In *Jensen* the appellants were the illegitimate child and children of deceased illegitimate children of Emilie Jensen, nee Christiansen. Mrs. Jensen had married and had two legitimate children who reached maturity, Chris and Magnus Jensen. Magnus died survived by two children, Tove Michaelsen and Niels Jensen, the appellees. The intestate decedent was Chris Jensen, who died without issue. The chart below willl clarify the situation. All of the illegitimate children emigrated from Denmark to the United States, as did the intestate.

Upon the death of the intestate in 1965, Mrs. Undhjem, the daughter of one of the illegitimate children of Emilie Christiansen, was granted letters of administration for the estate of Chris Jensen, and in 1966 she filed a petition for approval of the final report and

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

accounting and for distribution of the residue of the estate which permitted the illegitimates and their descendants to share with the legitimate children or their descendants by representation. The County Court approved the distribution, and the legitimate heirs appealed to the District Court of Burke County. The latter court decided that N.D.C.C. section 56-01-05 prohibited the illegitimate branches of the family from taking, and entered judgment for the legitimate branches. After entry of the judgment of the District Court, the illegitimate branches obtained new counsel, and moved to vacate the judgment under North Dakota Rules of Civil Procedure 60(b). The basis of the motion was that the failure of the first counsel to investigate the rules of Denmark to see whether or not the ancestors of the appellants might not really have been legitimate constituted "mistake, inadvertence, and excusable neglect." The new counsel also wished to raise the issue of the unconstitutionality of section 56-01-05 before the trial court at a new trial. Upon a denial of the motion to vacate the judgment, appeal was sought alleging abuse of discretion by the trial court in failing to vacate the judgment.

Upon appeal, Judge Erickstad held, in a very able opinion, that failure to vacate the judgment in order to hear the constitutional issue was an abuse of discretion under the circumstances. He then went on to treat the issue of the constitutionality of the statute as being raised on appeal, and to find section 56-01-05 unconstitutional under the Fourteenth Amendment of the federal Constitution and section 20 of the North Dakota Constitution.

The procedural issues which occupy most of Judge Erickstad's opinion need not detain us here. The matter of principal interest is the holding that section 56-01-05 is unconstitutional as an unreasonable classification under the Equal Protection Clause of the Federal Constitution and also the equivalent thereof in the North Dakota Constitution.

Judge Erickstad based his decision principally on the recently decided case of *Levy v. Louisiana*[23] in the United States Supreme Court. That case held unconstitutional a wrongful death statute, which, as interpreted by the courts of Louisiana, denied illegitimates the right to recover for the wrongful death of a parent, but permitted such recovery to legitimate children or illegitimates who had been acknowledged by the parent. The basis of the *Levy* decision is that biological and psychological relationships must be considered in determining the rights of children, and that the traditional legal distinctions observed in family law cannot by themselves be the basis for discrimination against the illegitimate. The law can thus

23. Levy v. Louisiana, 391 U.S. 68 (1968).

no longer overlook the fact that a child is the child of his natural parent and fail to extend him rights accorded other children simply because his parents have failed to abide by the formalities prescribed for recognition of children.

Judge Erickstad's opinion, covering an intestate succession law rather than a wrongful death statute, follows naturally from the *Levy* case, and would have been difficult to avoid after the latter opinion. There would appear to be no logical distinction between the wrongful death statute and the intestate succession statute for this purpose.

The *Jensen* case should not even prove controversial. As Judge Erickstad's analysis of the legislative history of the matter demonstrates, as long ago as 1917 North Dakota equalized the rights of all children, both legitimate and illegitimate, and that situation was only changed by some most astonishing legislative bungling. As a result of the *Jensen* opinion, we are now advancing to the standards of fifty years ago.[24] The legislature has just re-enacted the 1917 statute repealed by accident; even including a typographical error (although changing "it" and "its" to "he" and "his"):

> 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 it had been born in lawful wedlock. He shall inherit from his natural parents and from their kindred heir *[sic]*, lineal and collateral.[25]

This provision will pose problems when a child suddenly appears after the death of the putative father, claiming a share in the estate, and a very high burden of proof will have to be established to prevent abuses. There may also be a problem of pretermitted illegitimate heirs which did not previously arise, which await either judicial gloss or legislative action. Until these matters are clarified, estate planners will have to choose their words with some care in any case where such a contingency might arise.

III. THE STATUS OF THE MINOR HEIR

Subdivision 56-01-04 (4) (b), dealing with the status of the minor heir, is a curious subdivision, being, as it is, included with subdivision (a) which has nothing to do with the topic of subdivision (b). Subdivision (4) (b) reads:

4. If the decedent leaves:

24. *In re* Estate of Jensen, *supra* note 22, at 868-69.
25. Senate Bill 264 (1969). Compare Laws of North Dakota (1917), ch. 70 § 1, cited *id.* at 868.

. . .

b. Several children, or one child and the issue of one or more children, and any such surviving child dies under age without having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and the issue of any such other children who are dead, by right of representation. . . .

Subdivision 4(b) is also supplemented by division 5, which provides for the case arising when all other children of the parents of the minor heir are dead, but have left issue. It really adds nothing to subdivision 4(b) and indeed only complicates matters by including a *Maud v. Catherwood* provision which poses the same interpretational difficulties already discussed.

Subdivision 4(b) leaves many questions unanswered. Its aim is salutary: To redistribute the share in the decedent's estate among surviving children or issue when the minor heir does not survive long enough to make provisions for its disposition himself. This provision prevents the share of the surviving spouse in the deceased spouse's estate from being increased as the heir of his child. Furthermore, section 30-21-06 provides that when such minor heir dies before the close of administration of the parent's estate, no administration will be had of the minor's estate, but all that share coming from the parent will be distributed to the other children. Thus double administration expenses are avoided. Unfortunately, in spite of its meritorious objectives, subdivision (4) (b) leaves two basic questions unanswered: The position of the minor heir dying testate and the position of the illegitimate child of the minor heir.

The position of the testate minor heir is completely anomalous under the North Dakota statutes. Section 56-02-01 of the Code specifies that any person of the age of eighteen or older may make a will disposing of all or any part of his property. We are thus faced with a problem which can be illustrated with the following example: Frank Intestate dies leaving a son, Sam, aged three, and a daughter, Dolores, age two. Sam's share of Frank's estate is one million dollars. Some fiffteen years later Sam enters the service, and before being sent to a war zone makes a will leaving everything to his fiancee (this problem is not far-fetched; servicemen are now encouraged and given every aid in making wills in such situations by their commanders, whereas it might not ordinarily occur to one of that age bracket to make such a will). When Sam, at the age of nineteen, without being married, is killed in Viet Nam, who takes the one million dollar estate which descended to him from his father? It seems that under subdivision

(4) (b) Sam had some sort of contingent estate in the property, which could only become absolute upon his reaching the age of twenty-one. Therefore, although Sam could make a will at age eighteen, apparently nothing passed under it to his fiancee. Instead, subdivision (4) (b) divested Sam of his interest upon his death, and all of his interest must be distributed to Dolores.

It is submitted that this result is absurd. First, the result does not serve any conceivable statutory purpose, and indeed is in conflict with the expressed policy of allowing eighteen-year olds to dispose of their own property. Second, it is clearly against all judicial policies favoring early vesting of estates.

Once again, there appear to be no North Dakota cases on the subject, and none in any other jurisdiction having a similar statute. The language of the statute, however, may provide a way out of the old dilemma. Section 56-01-04 is expressly limited by its own language to cases involving intestacy:

> When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code, subject to the payment of his debts, in the following manner. . . .

Because of this provision, it would seem that the operation of section 56-01-04 could be restricted to the case where the child of the intestate also dies intestate.

There are further compelling reasons for reaching this result. If we treat the estate as one subject to contingency or subsequent divestiture, upon death of the minor heir endless accounting problems could arise. Until the heir safely married or reached majority, his administrator or executor might be required to deliver up every penny received from the parent's estate to the surviving siblings or issue thereof. If we treat the estate as fully vested, we may then read the statute as requiring transmission only of whatever remains of the parent's estate. Even here we may have problems, but they will not impose so severe a burden on the guardian and executors or administrators of the minor's estate.

The interplay of subdivision (4) (b) and the provisions for illegitimates also poses problems. If a minor becomes the parent of an illegitimate child, that child will inherit from the minor under the *Michaelsen* doctrine, as he would have in many instances under the old statute law. If the minor heir-parent dies then before reaching twenty-one and without marrying, all the estate coming to the minor heir-parent from his predeceased parent goes not to the illegitimate child, but to the brothers and sisters of the minor heir-

parent and their issue. It appears almost impossible to avoid this result on the basis of the language of the statute, but it is submitted that it is desirable to avoid this result. The statute clearly did not have this situation in mind. Furthermore, such a result may well be unconstitutional under the *Michaelsen* case as undue discrimination against the illegitimate.

IV. CONCLUSION

The above analysis indicates that there are areas of the intestate succession law which are vague and which require legislative clarification. Until such clarification is achieved, the practitioner will have to exercise considerable care in drawing wills and trusts. Whenever residuary and remainder clauses are involved, the practitioner should be aware of these problems, and should provide for them specifically. The tendency to use a form which simply provides for distribution according to the laws of intestate succession can easily lead to endless problems and litigation expense.