Intestate Succession Under the Uniform Probate Code

Thomas J. Mulder
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Estates and Trusts Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol3/iss2/4
INTESTATE SUCCESSION UNDER THE UNIFORM PROBATE CODE

Thomas J. Mulder*

I. Introduction

The pervasive social policy underlying the Anglo-American law on succession of property at death is freedom of testation.¹ Our law makes meaningful one’s right to decide who shall inherit his property by providing a legal instrument, the will, to distribute property to chosen recipients.

When a man dies without having exercised this right, however, the laws of intestate succession determine who shall receive his property, and in what shares it shall be received. In effect, the laws of intestate succession are an estate plan written for the decedent by his state legislature. These laws do not function as a restriction upon the freedom of testation; rather they serve as an alternative to it. It is generally thought that laws of intestate succession should distribute the estate of a man who dies without having written a will in the manner he would have chosen had he written one.² A statutory pattern of estate distribution should therefore reflect an appraisal of probabilities. The legislature should attempt to determine how most persons would distribute their estates and then create rules of succession to carry out this pattern. It does not appear, however, that the present laws of intestate succession accurately mirror the usual dispositive wishes of the average person. Indeed, recent quantitative research based on experience indicates the contrary and highlights

*Mr. Mulder is a member of the Editorial Board of Prospectus.
the need for reform of the intestate succession laws. In England, the committee responsible for rewriting the laws of intestate succession in 1951 examined a sample of wills in order to inferentially determine the dispositive wishes of those who had not written wills.\(^3\) Two recent American studies have followed in the footsteps of the English will studies. Professor Allison Dunham of the University of Chicago Law School gathered a random sample of estates probated in Cook County, Illinois, in 1953, and another random sample in 1957 and analyzed them to determine, among other things, the tendency of wills to depart from the distributive pattern of the Illinois Statute of Descent and Distribution.\(^4\) A team of two sociologists and a lawyer at Case Western Reserve University made a similar study of Cuyahoga County, Ohio estates as identified through probate court records of estates closed in 1965.\(^5\) The studies concluded that the distributive pattern of the English, Illinois and Ohio statutes of intestate succession do not accurately conform to present distributive desires, and that revision of these laws was required in order to ensure distribution of the estate to those whom the studies indicated would have been the most likely recipients had a will been written.\(^6\)


\(^{4}\)Dunham supra note 2, at 241-285.

\(^{5}\)M. Sussman, J. Cates & D. Smith, The Family and Inheritance (1968) [hereinafter cited as M. Sussman]; this volume is presently in the form of an unpublished manuscript available at the University of Michigan Law School Library. Prior to the Dunham and the Sussman studies, there were other efforts made to collect and correlate information from investigations of samples of wills. J. Wedgewood, The Economics of Inheritance (1929) was a British investigation which reported economic data similar to that found in the Dunham study. Powell & Looker, Decedent's Estates, 30 Colum. L. Rev. 919 (1930) analyzed judicial statistical records and inheritance tax figures over a period of time in several counties of New York. Ward & Beuscher, The Inheritance Process in Wisconsin, 1950 Wis. L. Rev. 393 was a study of Dane County, Wisconsin, probate records. The authors compiled a sample of 415 probate proceedings from the death certificates for the years 1929, 1934, 1939, 1941 and 1944. Professor Dunham relied heavily upon the research method and findings of the Wisconsin study in the design and analysis of his project.

\(^{6}\)See Report of the Committee on the Laws of Intestate Succession, England, CMD. No. 8310, at 3-7 (1957); A. Dunham, supra note 2, at 257; and M. Sussman, supra note 5, at Chap. 3. In addition to the will studies, other legal writers on the subject of intestate succession have proposed reform of state laws. See Jones, Alabama Probate Law—Need for Revision of Interstate Provisions, 20 Ala. L. Rev. 1 (1967); and J. Casner, Estate Planning at Chapter II, Estate Plan Created By Operation of Law (3rd ed., 1961).

This urge for reform is not surprising, however, since most state intestate succes-
Indeed, intestate succession laws not only require reform of their substantive dispositive provisions, but they also require procedural reform. Present probate practices have been criticized as oppressive, costly and time consuming. The statistics gathered by the Chicago study strongly suggest that the public has translated verbal criticism of probate practices into the active pursuit of probate avoidance.\(^7\)

The final, approved draft of the Uniform Probate Code\(^8\) makes
significant departures from the procedural provisions and from the distributive patterns of intestate estates found under state intestate laws.

The Code adopts the traditional view that intestate laws should mirror the dispositive intentions of the average person. As the general comments which preface the article on intestacy point out, the Code's drafters found state statutes to be antiquated. Thus, they revised the succession pattern in an attempt to make it responsive to contemporary problems and dispositive desires.

The Code is therefore problem responsive rather than historically oriented and represents more than an updated version of state intestacy laws. More specifically, the intestate rules of the Code are designed to provide an estate plan for the small estate owner who would ordinarily not write a will.

Inasmuch as the drafters of the Code have decided to focus on the dispositive wishes of small estate owners in formulating new intestacy laws, an accurate evaluation of the Code requires a determination of the wisdom of the drafters' decision. Such a determination depends upon an accurate delineation of that class of people who typically die intestate and therefore require the protection of the law. The empirical evidence generated by the will studies regarding intestacy provides valuable information in analyzing the soundness of the Code's position. Accordingly, this article will analyze the specific dispositive provisions of the Code

---

9U.P.C. Article II, General Comment to Part I.

10Address by Professor Richard V. Wellman, chief reporter for the Uniform Probate Code, National Conference of Commissioners on Uniform State Laws Honolulu, Hawaii, August 4, 1967, in UNIFORM PROBATE CODE, Working Draft Number Three at 12-13 (hereinafter cited as R.V. Wellman, Hawaii Address). Professor Wellman has indicated that the drafters of the Code derived their knowledge of the current dispositive desires of intestate persons from two sources. The experience of the probate bar, whose members have helped all types of clients write a variety of wills, provided the drafters with an intimate awareness of the problems facing a testator and knowledge of how these testators desired to solve their problems. A second source of information came from the recent will studies made by Professor Dunham in Chicago, by the committee for revising the English probate laws in England and by Professors Ward and Beuscher in Dane County, Wisconsin. See note 5 supra. The Cleveland study was not utilized by the drafters since it was not produced until after the Code was written. However, Professor Wellman has informed the author that the data of the Cleveland study has been most persuasively used in presentations of the Code to the National Commission on Uniform State Laws.

11The general comments to the intestacy article of the Code state: "A principal purpose of this Article ... is to provide suitable rules ... for the person of modest means who relies on the estate plan provided by law." U.P.C., Article II, General Comment to Part I. [Emphasis added]
in light of the data generated by the studies. However, it is first necessary to determine whether the studies are an appropriate standard to use in examining the provisions of the Code.

II. The Will Studies

A. Methodology and Utility

As the basis of the Chicago study, Professor Dunham used ninety-seven estates for which probate proceedings were initiated in 1953 and seventy-three estates of persons who died in 1957.12 The earlier sample was obtained from a random selection of estates opened in Cook County in 1953. A different, more complicated procedure was used to select the 1957 sample. Rather than selecting the sample directly from Probate Court records, Professor Dunham employed the first 500 death certificates issued in 1957 in his sample. He excluded all non-residents of Cook County and persons who were under the age of twenty at the time of death. The name index of the Probate Court records was then compared to the names on the death certificates. This procedure yielded the seventy-three estates which were subsequently investigated. In the Cleveland study, Professor Sussman and his colleagues obtained a five percent random sample of all estates closed in Cuyahoga County Probate Court between November 9, 1964, and August 8, 1965.13 There were 659 decedent estates in this sample. In addition to investigating these estates, Professor Sussman and his co-workers interviewed the survivor population. The survivor population was defined as legatees and devisees, contingent beneficiaries, and all those eligible to inherit from the decedent under the Ohio Statute of Descent and Distribution, whether or not they actually inherited. These interviews were designed to ascertain the extent of the heirs’ or would-be heirs’ satisfaction with the dispositions affecting them, and to determine the dispositive intentions of the survivor class itself.

The most significant contribution of these will studies toward the revision of intestate succession laws is the quantitative information they provide on the patterns of distribution chosen by testators. The data indicate the extent to which present laws of

12A. DUNHAM, supra note 2, at 241-242.
13M. SUSSMAN, supra note 5, Chapter III at 16-17.
intestate succession actually reflect the contemporary dispositive pattern evidenced by wills. If the will studies demonstrate that the distributive pattern chosen by testators deviates from that provided by current laws of intestate succession, then these laws should be changed unless: (a) intestate laws should deviate from the normal testate pattern in order to encourage people to write wills, or (b) the dispositive wishes of those who make wills vary from the wishes of those who do not.

Proposition (a) appears to be contrary to the philosophy of freedom of testation which underlies the law of wills. An inducement to write a will is inconsistent with this principle since freedom of testation implies the right to an untrammeled choice in deciding whether to write a will. To punish an intestate for failing to exercise his choice would make testation a duty, not a right. The position of the Code, as expressed in the comments to the article on intestacy, is that the law should provide for the needs and desires of the largest possible number of persons. If a person feels his needs differ from the norm, he has the option of writing a will in harmony with those needs.

Proposition (b) strikes at the central premise of the will studies. The studies assume that the dispositive wishes of testators are similar to those of intestate persons, and that the distributive patterns espoused by testators can therefore serve as guidelines for rules of intestate succession. However, if proposition (b) is correct, the utility of the will studies' data in the reform of intestate succession laws is doubtful. In the Cleveland study, the authors interviewed a sample of "survivors" selected on the basis of their relationship to the decedent sample. A proponent of proposition (b) would predict that differences in dispositive desires would exist between testate and intestate persons. Yet the results of the interviews demonstrated remarkable similarity of views among the two groups. This result, as well as common sense, would indicate that proposition (b) is incorrect.

14Id. Chapter VI at 34-37. Professor Sussman found that people who wrote wills usually left the entire estate to the spouse. On the other hand, the Ohio intestate law required the estate to be divided between the spouse and the children. Among the survivor class, however, adult children usually signed over their share of the estate to the spouse, thus giving the spouse the entire estate. One exception to the "spouse-all" pattern was found in both testate and intestate cases where the decedent left children from a prior marriage. In such situations, most testators divided their estate between the second spouse and the stepchildren. In the survivor class, stepchildren did not
Since most testate persons use attorneys to write their wills, the dispositive patterns of wills reflect the advice of legal counsel. By using the will studies data as a model for constituting intestate dispositive provisions, intestate persons indirectly receive the benefit of this legal counsel. In this manner, small estate owners who probably cannot otherwise afford legal services receive the advantages of such services.

B. Predictive Factors of Testacy

The will studies have isolated certain characteristics which describe the owner of an intestate estate.\(^\text{15}\) Among these characteristics, the most important are wealth, age, and occupation.\(^\text{16}\)

1. Wealth

Wealth, defined in the Cleveland will study as capital accumulation, was closely correlated with testacy. In the Chicago study, Professor Dunham discovered that ninety percent of the wealth transmitted at death through probate was transmitted by will, although only approximately sixty percent of the decedents with estates in probate had written wills.\(^\text{17}\) On an individual basis, this

\(^{15}\)Of all the estates in the Chicago survey which resulted in some type of probate proceeding, forty-two percent of the estates belong to persons who died intestate. A. DUNHAM, supra note 2, at 248. Professor Sussman calculated that thirty-one percent of the estates in the Cleveland survey were owned by persons who died intestate. M. SUSSMAN, supra note 5, Chapter IV at 3. The two studies indicate that approximately one-third of the probated estates belong to people who do not have wills. This statistic alone does not tell us, of course, who is likely to die intestate. It does, however, reveal the importance of the intestate succession laws and suggests the necessity for creating an acceptable statutory estate plan.

\(^{16}\)See A. DUNHAM, supra note 2, at 248-251 and M. SUSSMAN, supra note 5, Chapter III at 9-13 where these factors are set forth to explain the phenomenon of testacy, and M. SUSSMAN, Chapter IV at 5-34, which records the data that supports this hypothesis.

\(^{17}\)A. DUNHAM, supra note 2, at 250-251. See also Stephenson, Trust Business in Hawaii,
represented an average gross testate estate of $41,885 as compared with an average gross intestate estate of $7,920.\textsuperscript{18} The Cleveland study reported similar figures: an average gross testate estate of $41,218, and an average gross intestate estate of $8,599.\textsuperscript{19}

Although the definition of wealth as capital accumulation worked well for associating wealth with testacy in the decedent sample, Professor Sussman felt that it was an inadequate definition for the “survivor class.” In Sussman’s opinion, many survivors would be reluctant to disclose their total assets. Moreover, he felt that the capital accumulations of this youthful group would not be indicative of their eventual wealth. For this latter category, therefore, wealth was defined as income; a high income was thought likely to produce substantial capital accumulation. Indeed, income was shown to be a good indicator of testacy in the “survivor class.”\textsuperscript{20} Thus, capital accumulation (or a high income and the concomitant likelihood of capital accumulation) appears to be a major factor underlying the decision to write a will. Conversely, persons with small estates are statistically more likely to die intestate.

\textbf{2. Age}

Age appears to be a second important factor in predicting testacy. Professor Dunham found that ninety percent of the wills he investigated had been written within ten years of the testator’s death.\textsuperscript{21} Given today’s average life expectancy, Professor Dunham’s findings indicate that most persons who write wills do not do so until their late fifties. Unfortunately, Professor Dunham could not obtain information on whether earlier wills had been executed, and thus whether testators rewrite their wills in light of changing family needs and capital accumulations. Nevertheless, it would seem fair to conclude, as a general proposition, that intestacy is a function of age; the older the person, the more likely

\begin{footnotes}
\footnotetext{100 Estates and Trusts 73 (1961). Stephenson reports that in Hawaii in 1948 it was estimated that 85 percent of the total property transmitted at death passed under a will.}
\footnotetext{18A. Dunham, supra note 2, at 264.}
\footnotetext{19M. Sussman, supra note 5, Chapter IV at 19.}
\footnotetext{20Id. Chapter IV at 23.}
\footnotetext{21A. Dunham, supra note 2, at 279.}
\end{footnotes}
he is to write a will. The Cleveland study supports this hypothesis. That study revealed that the percentage of testate persons increased with age; twenty-five percent of those in the twenties age group were testate, forty-one percent in the thirties age group, and seventy-eight percent in the sixties age group.\textsuperscript{22}

3. Occupation

Occupation was perhaps the third most important predictive factor of testacy. In the Chicago study, the group labelled "proprietors" were statistically most likely to execute wills; ninety-one percent were testate in 1957.\textsuperscript{23} The results of the Cleveland study add further support to this generalization.\textsuperscript{24} Neither study, however, generated any data to explain the relationship between occupational status and testacy. One may only speculate as to the explanation of this phenomenon. It seems the most likely explanation is that people with high occupational status tend to have greater accumulations of wealth than those in lower positions.\textsuperscript{25}

However, occupation proved to be a poor indicator of testacy in the Cleveland survey for persons over sixty.\textsuperscript{26} In this group, age seemed to be the overriding factor in predicting testacy. This result emphasizes the need for an accurate determination of the interrelationship between wealth, age, and occupation as predictive factors of testacy.

\textsuperscript{22}\textsc{M. Sussman, supra note 5, Chapter IV at 6.}
\textsuperscript{23}\textsc{A. Dunham, supra note 2, at 248. The heirarchy of occupational status used in both the Chicago and the Cleveland studies was the Hollingshead Index. A. Hollingshead, Two Factor Index of Social Position (New Haven, Conn. 1957) (Mimeograph). The class of "proprietors" were defined as persons in management or the professions. See A. Dunham, supra note 2, at 245. See also M. Sussman, supra note 5, Chapter IV at 24.}
\textsuperscript{24}\textsc{See M. Sussman, supra note 5, Chapter IV at 25, 29.}
\textsuperscript{25}\textsc{See discussion of capital accumulation as a factor predictive of testacy in text accompanying notes 17-20 supra. Perhaps an additional factor is that persons who rate high on an occupational scale are generally more familiar with planning for the future due in part to the nature of their positions as proprietors, managers and professional people and the concommitant need for expertise in long-range planning.}
\textsuperscript{26}\textsc{See M. Sussman, supra note 5, Chapter IV at 25-26. Testacy was correlated with high occupational status for both decedents and survivors. In the decedent sample, however, the relationship held only for those under sixty. Professor Sussman's data show that after age sixty, the association between occupational status and testacy is not statistically significant:}
4. Interrelationship of Predictive Factors

Perhaps the simplest way to illustrate this interrelationship is to examine the course of a man's life span. In his twenties, he is statistically most likely to be intestate.\(^{27}\) Age clearly is the explanation for the low testacy rate at this point.\(^{28}\) Death seems far off, and the need for a will appears remote.\(^{29}\) In the Cleveland study, the thirties and forties proved to be a time of frequent will making in the lives of the "survivor class." Two thirds of the testate "survivor class" had written wills by age forty-five.\(^{30}\) However, age can probably be discounted as the paramount explanation for this phenomenon. Rather, wealth and occupation are better indicators of testacy during this time of a person's life. By age forty-five, a man has established himself in his career and has generally accumulated some wealth. In addition, the responsibilities of maintaining a family are evident. Professor Dunham suggests that a fourth factor may be involved: the educative process of going through probate. He found that only thirty percent of those women who predeceased their spouses were testate while seventy-five percent of those who survived their husbands were testate.\(^{31}\) The difference was not as pronounced for men. Yet men with children who predeceased their wives were testate in half the cases while three out of five of those who survived their spouses were testate.\(^{32}\) To Professor Dunham, this evidence "suggests that a previous experience with death and its property

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Entire group & Number & Rho  \\
Ages & & Percent \\
\hline
21-49 & 461 & .79  \\
50-59 & 40  & .80  \\
60-69 & 75  & 1.00  \\
70-79 & 127 & .53  \\
80-89 & 151 & .07  \\
\hline
\end{tabular}
\caption{Correlation of Ranks By Occupation and Percent Testate -- Age Controlled for Decedent Sample}
\end{table}

\(^{27}\)Id. Chapter IV at 6.
\(^{28}\)See text accompanying notes 21-22 supra.
\(^{29}\)M. Sussman, supra note 5, Chapter IV at 41. Prof. Sussman suggests that those who do write wills during their twenties are conscious of the burden of providing for a family.
\(^{30}\)Id. Chapter IV at 12.
\(^{31}\)A. Dunham, supra note 2, at 249.
\(^{32}\)Id.
problems in the immediate family tends to induce both men and women to have wills.\textsuperscript{33}

In the older age groups, such as the sixties, seventies and eighties, the percentage of testate persons steadily increases. Seventy-eight percent of those in their sixties and eighty-two percent of those in their seventies had written wills in the decedent sample of the Cleveland study.\textsuperscript{34} The recognition of the proximity of death doubtless accounts for the high rate of testacy in these age groups.

Of the three indicators of testacy, age seems to be the most significant.\textsuperscript{35} It is the probable explanation of the low testacy rate for the young and the high rate for the old. Occupation and wealth do not seem especially significant indicators of testacy for these groups. Yet the frequency of testacy among the forties group indicates that the imminence of death alone cannot account for the rate of testacy; other factors must be considered. Wealth and occupation seem to operate somewhat independently from age and would account for the frequency of testacy during middle age.

In summary, the will studies indicate that those who typically die intestate are the young, those who have accumulated only modest possessions, and those of rather low occupational status. It seems unlikely that many persons in these groups feel a compelling need to write a will. The decision on the part of the Code's drafters to concentrate on small estate owners in designing a realistic statutory estate plan is thus supported by the findings of the will studies. It is not clear, however, that the Code has fully achieved its goal of drafting intestate succession provisions which will effectuate the dispositive desires of most intestate decedents. The remainder of this article will attempt to highlight those dispositive provisions in which the Code has, in the author's opinion, fallen short of its express purpose. Various definitional sections of the Code will be analyzed in the light of recent reform efforts of state legislatures. Finally, the sections of the Code which govern the administration and duration of intestate probate proceedings

\textsuperscript{33}Id.
\textsuperscript{34}M. SUSSMAN, supra note 5, Chapter IV at 11.
\textsuperscript{35}Id. Chapter IV at 33.
Prospectus

will be examined to determine whether the Code provides a more expeditious, less complicated, and less costly alternative to present probate practices.

III. The Statutory Estate Plan of the Uniform Probate Code

A. Share of the Spouse

1. The Code's Dispositive Scheme

The Uniform Probate Code makes no distinction between real and personal property; both descend by the same pattern. The Code also abolishes the common-law concepts of dower and curtesy. Under section 2-102, the spouse's share varies according to four contingencies:

1. If no surviving issue or parent of decedent, spouse takes entire intestate estate;
2. If no surviving issue but decedent is survived by a parent(s), spouse takes first $50,000 plus one-half the balance;
3. If there are surviving issue and all of them are issue of the decedent-spouse marriage, spouse takes the first $50,000 plus one-half the balance; (Emphasis added)
4. If there are surviving issue of the decedent and one or more are not issue of the decedent-spouse marriage, spouse takes one-half of the net intestate estate. (Emphasis added)

2. Spouse: Sole Survivor

The will studies clearly support the plan adopted for the situation in section 2-102(1). Nearly ninety percent of the testators in the Cleveland study gave their entire estate to the spouse when no issue or parent survived. Twenty-seven of the twenty-eight testators in the Chicago sample followed this pattern.

3. Spouse and Decedent’s Parents

Section 2-102(2) is an attempt by the drafters to deal with the

36U.P.C., Article II, General Comment to Part I.
37U.P.C., § 2-113 and Article II, General Comment to Part II.
38M. SUSSMAN, supra note 5, Chapter V at 9.
39A. DUNHAM, supra note 2, at 253.
problem of a short decedent-spouse marriage. A primary reason for including the decedent’s parents in the distribution of the estate is that when the decedent of a short decedent-spouse marriage leaves an estate exceeding $50,000, it is probable that the parents of the intestate provided a good share of the assets in the estate. Section 2-102(2) serves to return a portion of those assets to their source. It is possible that an intestate could leave surviving parents and no issue after a marriage which has lasted for a relatively long period. Parents are unlikely to be major contributors of property in marriages of long duration. Under these circumstances, section 2-102(2) apparently is designed to retain a portion of the estate within the decedent’s own blood line. Section 2-801 complements section 2-102(2) by allowing the intestate’s parents to renounce their share if they desire to give the spouse the entire estate.

Under present law, most states include both the parents and the spouse in the distribution. The will studies failed to generate any data regarding this distributive pattern. Without clear data justifying a different pattern, the drafters apparently decided to adopt the status quo. The author suggests that the general spouse-all pattern which seemed to hold for marriages of all durations indicates that section 2-102(2) should be changed. To suggest that the spouse be given the entire estate is admittedly a value judgment; yet, married persons have established a new family unit, and each spouse probably feels the property of one belongs to the other.

4. Spouse and Issue

a. Proposed Amendment to Section 2-102(3)

The pattern for section 2-102(3) seeks to: (a) give the spouse a larger share than most state statues provide, (b) take maximum

---

40See Uniform Probate Code, Working Drafts Numbers One, Three, and Five.
41Interview with Professor Richard V. Wellman, October 7, 1969.
42Id.
43T. Atkinson, supra note 1, § 17.
44Interview supra note 41.
45M. Sussman, supra note 5, Chapter XIII at 3-4. An exception to the "spouse-all" pattern occurs when the decedent has left stepchildren. In this situation, the testator divides the estate between the recent spouse and the stepchildren. See note 14 supra.
advantage of the marital deduction,\textsuperscript{46} and, (c) in the case of estates under $50,000, give the entire estate to the spouse to avoid the protective proceedings which may be necessary when the property passes outright to minor children.\textsuperscript{47} Michigan law, for example, gives only one-third to the spouse and two-thirds to the surviving children.\textsuperscript{48} Data from the will studies indicate that this statutory allotment does not correspond to the actual wishes of most testators. In the Cleveland sample, Professor Sussman discovered that eighty-five percent of the testate persons willed their entire estate to the spouse when a spouse and children survived.\textsuperscript{49} More dramatic is Professor Sussman's finding that in seventy-one percent of the intestate dispositions studied where issue survived the decedent, the issue voluntarily redistributed the property by giving the spouse all or a greater share of the estate.\textsuperscript{50} In the Chicago sample, all of the testators gave the entire estate to the spouse when spouse and children survived.\textsuperscript{51} Thus it seems clear that most testators give all their estate to their spouse in order to provide for her\textsuperscript{52} during the remainder of her life, and rely upon the spouse to leave the property to their children. In light of this finding, the author suggests amending the Code's pattern for the situation in section 2-102(3). Rather than giving the first $50,000 plus one-half the remainder to the spouse, the surviving spouse should take the entire estate.

In giving the entire estate to the spouse, however, one runs the risk that the spouse will disinherit the children. This problem, of course, could be avoided by giving a substantial part of the property outright to the children, as most state statutes presently provide. The drafters of the Code have apparently chosen a middle course between the conflicting economic interests of the spouse and of the children by giving the spouse the first $50,000,

\textsuperscript{46}\textit{Interview}, \textit{supra} note 41.
\textsuperscript{47}\textit{U.P.C.} § 5-401 defines protective proceedings as a procedure by which the court may, upon petition and after a hearing, appoint a conservator to manage and protect the property owned by a minor if the court determines that the minor is incapable of managing the property.
\textsuperscript{49}\textit{M. Sussman, supra} note 5, Chapter VI at 8.
\textsuperscript{50}\textit{Id.}, Chapter VI at 36.
\textsuperscript{51}\textit{A. Dunham, supra} note 2, at 263.
\textsuperscript{52}For convenience the author will refer to the surviving spouse by pronouns of the feminine gender.
and one-half of the remaining estate to the children. In taking this position, the Code and existing state law seemingly adopt an attitude of distrust toward the spouse. The will studies indicate, however, that this is not an attitude shared by most testators. In a uniform code that seeks to write a will for all intestate persons, such a blanket attitude of distrust seems inappropriate. Rather, where such distrust actually exists, one of two alternatives should be provided; the individual should be left to implement his own testamentary desires through a will, or the probate judge should be vested with discretionary power to require that the spouse post bond, or, if necessary, give the children an immediate share in the estate.

b. The Marital Deduction and Proposed Section 2-102(3)

Giving the entire estate to the spouse would not vitiate the Code’s attempt to take maximum advantage of the marital deduction. Under section 2056 of the Internal Revenue Code, a marital deduction is allowed from the gross estate of the decedent equal to the value of the property passing outright to the spouse, but not in excess of one-half the adjusted gross estate. When the spouse receives only one-third of the estate, as under most state laws, the estate does not receive the maximum possible deduction. However, when the spouse receives the first $50,000 and one-half the balance of the entire estate, the estate will receive maximum benefit from the marital deduction. Likewise, when the spouse takes the entire estate, the maximum marital deduction is available; thus, the actual estate tax is the same whether the spouse takes the entire estate or only $50,000 plus one-half the balance. An illustration will make this clear.

53See note 6 supra.

54The purpose of the informal probate proceedings of the Uniform Probate Code is to eliminate judicial proceedings in this area when they are unnecessary. See U.P.C., Article III. Introduction. In keeping with this policy, the judge should be given discretionary powers to set bond or give the decedent’s children a share in the estate only where an interested party believes that the spouse cannot be trusted to provide for minor children or that she is most likely to disinherit the children and requests court assistance. Code section 3-305 vests the registrar of the court with the discretionary power to refuse informal appointment of a personal representative. This would force a court proceeding to appoint formally a personal representative and would allow imposition of a bond if necessary.

55Int. Rev. Code of 1954, § 2053. Adjusted gross estate is the gross estate reduced by funeral expenses, state inheritance taxes, administrative expenses and losses during the period of administration caused by theft or casualty.
State Law: Spouse receives one-third either before or after tax depending on state law and its judicial interpretations. We shall assume before taxes.

<table>
<thead>
<tr>
<th></th>
<th>State Law</th>
<th>Code</th>
<th>Proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjusted Gross Estate:</td>
<td>$150,000</td>
<td>$150,000</td>
<td>$150,000</td>
</tr>
<tr>
<td>Spouse's share</td>
<td>50,000</td>
<td>100,000</td>
<td>150,000</td>
</tr>
<tr>
<td>Marital Deduction:</td>
<td>50,000</td>
<td>75,000</td>
<td>75,000</td>
</tr>
<tr>
<td>§ 2052 Deduction:</td>
<td>60,000</td>
<td>60,000</td>
<td>60,000</td>
</tr>
<tr>
<td>Taxable Estate:</td>
<td>40,000</td>
<td>15,000</td>
<td>15,000</td>
</tr>
</tbody>
</table>

Under the Code, the surviving spouse would receive $100,000 in this hypothetical situation. The entire $100,000 would qualify for the marital deduction since the property is included in determining the value of the adjusted gross estate and passes to the spouse free of any contingencies. Thus the maximum marital deduction of $75,000 would be utilized. Under the author's proposal, the surviving spouse would receive $150,000 worth of property qualifying for the marital deduction. Hence, the maximum marital deduction of $75,000 will similarly be available when the surviving spouse receives the entire estate.

One disadvantage of the author's proposal, however, is the potentially greater tax liability which may arise when the property passes to the children upon the death of the spouse. When the surviving spouse takes the entire estate of the decedent, the assets of the estate are taxed twice; that is, they are taxed once in the decedent's estate, and again in the estate of the surviving spouse at the time of her death.

Maximum tax savings are achieved only by minimizing this type of double taxation. If the spouse is given exactly one-half of the adjusted gross estate, and this property qualifies for the marital deduction, then the maximum benefit of the marital deduction will be realized. Since the surviving spouse receives only one-half of the decedent's estate, none of the estate will encounter the above type of double taxation inasmuch as her share is not tax-

---

56 Int. Rev. Code of 1954, § 2052, authorizes an exemption of $60,000 from a decedent's gross estate for purposes of the federal estate tax.
able and the other half will go directly to others. If, however, the surviving spouse takes less than one-half, she will not realize the maximum benefit of the marital deduction. On the other hand, if she receives more than one-half, while the full benefit of the marital deduction is realized, a portion of the estate is then subject to double taxation.

The Code approaches the point of maximum tax savings more closely than does the author's proposal. Under the Code, the surviving spouse receives the first $50,000 plus one-half the remainder of the estate. Thus, if the adjusted gross estate totals $150,000, the spouse will receive $100,000, and the marital deduction will be $75,000, one-half the adjusted gross estate. The $25,000 difference between the property received by the spouse and the marital deduction may be subject to taxation again upon the spouse's death. On the other hand, if the spouse takes the entire adjusted gross estate of $150,000, then the $75,000 difference may be subject to double taxation. The Code, therefore, would provide greater tax savings than the savings available under the author's proposal.

c. Advantages of Proposed Section 2-102(3)

Section 2-102(3) will not produce maximum tax savings. In addition to potential double taxation, the Code provision does not apply to property which passes outside of probate such as life insurance proceeds, joint property, joint bank accounts, and inter vivos trusts. If the assets transferred outside of probate went to the surviving spouse, she must then receive less than one-half the probate assets if she is to take precisely the amount of property to qualify for the marital deduction. Similarly, if the assets transferred outside probate went to persons other than the surviving spouse, she would have to take more than one-half the probate assets lest her share of the property of the decedent under-qualify for the marital deduction. If maximum tax savings are desired, the Code would have to incorporate a formula clause to insure that the spouse's share is precisely one-half the estate.57 However,

inclusion of a formula clause would be unrealistic because it ties state probate law to federal tax law. A change in the marital deduction provisions might so affect the formula clause that it would no longer provide maximum tax savings.

In giving the spouse the first $50,000 plus one-half the remaining estate, the drafters have chosen the middle path between maximum tax savings and providing for the support and maintenance of the spouse. On the other hand, the author's proposal, which gives the entire estate to the spouse, is premised upon the findings of the will studies which indicate that support of the spouse predominates over concern with potential tax savings, especially among smaller estates.\textsuperscript{58}

The Code deviates from the spouse-all pattern only when the decedent's estate exceeds $50,000. In estates over $50,000, Professor Sussman discovered that testators, after providing for the spouse, made gifts to children, spouses of children, heirs more remote than children, friends and charities.\textsuperscript{59} This evidence seems to lend support to the Code's position. However, Professor Sussman also discovered that only two estates out of the 265 intestate estates in his sample exceeded $60,000.\textsuperscript{60} If the Code is to remain faithful to the philosophy of designing intestate succession laws to favor the small estate owner, the spouse should receive the entire estate since intestate estates which exceed $50,000 are not likely to exceed that figure by large amounts. If the estate does not greatly exceed $50,000, the spouse will probably need the entire estate for her support and maintenance. In the decedent's mind, the needs of the spouse will generally take precedence over tax considerations. In those instances where tax considerations are considered more important, the decedent should write a will if he desires a different result. When the spouse does wish to achieve maximum tax savings, she can make gifts of the property or disclaim the amount of property that exceeds the marital deduction.

In addition to more closely mirroring the decedent's wishes, distribution of the entire estate to the surviving spouse also elimi-

\textsuperscript{58}M. Sussman, supra note 5, Chapter V at 13-14.
\textsuperscript{59}Id. Chapter XII at 8.
\textsuperscript{60}Id. Chapter VIII at 1.
nates the need for protective proceedings since the minor children would take no property.\(^{61}\)

5. Spouse and Issue From Prior Marriage

Section 2-102(4), in which the Code deals with surviving stepchildren, is consistent with the findings of the Cleveland study. Professor Sussman discovered an exception from the spouse-all pattern where there were children from a prior marriage. In such cases the testator generally split his estate between his present spouse and the stepchildren.\(^{62}\) The Code does likewise, giving the spouse one-half and the children equal shares in the remaining half.\(^{63}\)

B. The Remainder of the Estate

The general pattern in section 2-103 for the distribution of the estate remaining after the spouse's share, in descending order, is as follows:

1. issue;
2. parents;

\(^{61}\)Section 5-401 provides that a court may, upon petition and after a hearing, appoint a conservator to manage and protect the property owned by a minor if the court determines that the minor is incapable of managing the inherited property. When property passes to minor children, protective proceedings should be available since, for example, a child three years of age cannot manage an inheritance. Yet protective proceedings do have drawbacks; a court appointed conservator may not, in fact, be the most competent person to manage the property, or he may not use the property in a manner that the intestate would have desired. In addition, the proceedings are both expensive and cumbersome. Section 5-103 of the Code provides a limited solution to this problem. If the property passing to the minor children does not exceed $5,000, payment may be discharged without protective proceedings. Of course, a better solution is to eliminate the need for protective proceedings altogether.

\(^{62}\)Id. Chapter VI at 35. See also note 14 supra.

\(^{63}\)U.P.C., §§ 2-102(2)-(4), which distribute the first $50,000 of the net intestate estate to the spouse and divide equally the remainder of the estate, giving the spouse half and the children or parents the other half, and which divide the estate between the spouse and the stepchildren, raise a problem of valuation. It must be determined, for instance, when the spouse has received $50,000 worth of the estate. Where there is partial intestacy, it will also be necessary to value the property passing to the spouse under the will because the $50,000 limit refers to property the spouse receives, whether under a will or by intestacy. Although discussion of these problems of valuation are beyond the scope of this article, it is clear that the Code's division of shares by fixed money amounts and fractions raises serious problems for the personal representative who must apportion the assets of the estate. For a discussion of the general problem of valuation, see J. Bonbright, The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes (1st ed., 1937).
(3) brothers and sisters, or issue of brothers and sisters if there are no surviving brothers or sisters;
(4) grandparents—divided equally between maternal and paternal grandparents;
(5) issue of grandparents;
(6) escheat (§ 2-105).

1. The "Laughing Heir"

This hierarchy is of special interest both because of the one problem it does solve and the one that it does not solve. By terminating distribution at the level of the grandparents' issue, the Code alleviates the problem of the "laughing heir." This problem arose from a distributional hierarchy which extended to, and if necessary beyond, the issue of the intestate's great grandparents. Given this hierarchy, it was possible for the entire estate to go to a remote heir who was completely unknown to the intestate. Upon examination of the data procured in the Chicago study, Professor Dunham questioned the justification for distributing property to relatives more distant than the issue of the decedent's brothers and sisters. It can be inferred from the data that those decedents who had no relatives closer than issue of brothers and sisters, but who did have heirs at a more remote level, either made a will providing for deserving friends and charities, or simply did not care what happened to their property.\textsuperscript{64} The intestate laws obviously cannot establish general rules for the distribution of estates to provide for friends, favorite charities and the like. As an alternative, most state laws have distributed the estate to remote heirs on the assumption that the intestate person would prefer this result to escheat of the estate.\textsuperscript{65} This result would seem proper in a society where people tend to live and die in the same general vicinity and to have some contacts with their remote heirs. In contemporary society, however, where geographic mobility is increasingly characteristic of most families, there is less reason to continue this practice. The data of the Chicago study indicates that escheat is no less desirable than distribution of the estate to remote heirs.

\textsuperscript{64}A. Dunham, supra note 2, at 255 & 263.
2. The Spouse of the Intestate's Child

Under the Code, as well as under most state intestate law, if a child of the decedent predeceases him, the child's spouse will not receive an inheritance. In the Cleveland study, Professor Sussman noted that the absence of close family members triggered gifts to spouses of those absent family members. Professor Dunham likewise recognized the tendency of testators to deviate from the Illinois intestate law by including the spouses of the children. This evidence suggests that the Code be revised to provide a share for the spouse of a deceased child provided that the spouse has not remarried. Moreover, where the issue of the decedent's children take by the right of representation, a share should not be given to both the surviving spouse of the decedent's child and to the issue. Rather, the spouse should serve as a substitute for the children, taking the share her marriage partner would have taken had he survived the decedent. A diagram will illustrate this point:

```
Decedent
   /  \
  A   B
     /  \
    C(Spouse D)
      /   \ 
     X'   X''
```

A and B are alive; C is dead but he has left a spouse D and two children X' and X''. Under the Code, the decedent's estate will be divided into three parts, one for A, one for B and one for C. Since C is dead, his two children, X' and X'', split his one-third share. However, under the suggested proposal, C's spouse D would take C's interest provided she has not remarried. If she has remarried, X' and X'' would divide C's interest equally.

---

66T. ATKINSON, supra note 1, §§ 7, 18.
67M. SUSSMAN, supra note 5, Chapter V at 55.
68A. DUNHAM, supra note 2, at 254.
69The spouse who remarries should not inherit. Remarriage removes the spouse from the family of her in-laws. If the surviving spouse is the wife, her new husband can provide for her.
70To take by right of representation means that the issue of a deceased person inherits the share of an estate which the deceased person would have inherited had that person survived.
The author's proposal is limited to including only the spouse of the decedent's children. The decedent's children can, in turn, provide for the spouses of their children. If the spouses of the decedent's grandchildren were included, it is possible that the further division of the estate would substantially reduce the grandchildren's share. At that level of distribution, the shares are most likely to be relatively small already, and further division seems unproductive.

The Chicago study noted a second deviation from the Illinois intestate law; testators tended to give their children unequal shares in the estate. The Cleveland study found a similar deviation from the Ohio intestate law. Such allotments take a variety of forms incapable of formulation into a general rule which would adequately cover all situations. The Code, in section 2-103, adopts the traditional statutory method of giving the children equal shares. While perhaps not the best approach in light of the children's varying economic needs, this provision appears to be the most practical solution. The decedent is free to write his own will where the circumstances require a different result.

C. Definitional Provisions

1. Representation

In distributing the non-spouse part of the intestate estate, section 2-103 of the Code employs the concept of representation. Section 2-106 defines this concept as follows:

... The estate shall be 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 the deceased person in the same degree being divided among his issue in the same manner.

[71A. Dunham, supra note 2, at 254.
72M. Sussman, supra note 5, Chapter V at 28.
73Per stirpes denotes the method of dividing an estate in which a group of distributees take the share which their deceased ancestor would have been entitled to take if he survived. Thus, they take by representation of the deceased ancestor. Per stirpes is contrasted with per capita, which is the division of an estate into equal shares to be given to each person standing in equal degree to the decedent without reference to representation.
The following illustration demonstrates the method prescribed in section 2-106.

```
Decedent
   /\                           /\                  /\    \
  A (dead)  B (dead)  C (dead)  B'' (dead)  C' (dead)
  /   \         /   \    /   \        /   \   /   \  
A'  B'  B''  C'  X'  X''
```

The estate is first divided into three shares, A', B' and B''. The first generation is ignored since none of its members survived the decedent. C' is also ignored since he neither survived nor left issue who survived the decedent. Of the three shares, A' takes one, B' takes one and X' and X'' divide the third.

Currently, the language of those state statutes which require distribution of the estate “by right of representation” is interpreted in two ways. One interpretation is set forth explicitly in section 2-106 of the Code; the other interpretation is illustrated by Maud v. Catherwood. In Maud, rather than using the closest generation to the decedent that has a surviving heir, the court used the first generation to divide the shares initially. In the above illustration, the Maud approach would produce quite different results; A' would get one-half, B' would take one-fourth and X' and X'' would split the remaining one-fourth. There is no reason why A' should take a larger share than B'. The Code’s method insures equality in this regard. Section 2-106 of the Code should eliminate the interpretative problem of distributing by right of representation.

---

74 See MODEL PROBATE CODE (1946), Comment to § 22.
75 Maud v. Catherwood, 67 Cal. App. 2d 636, 55 P.2d 111 (1945). In Maud, the testator set up a trust for the benefit of his spouse and their seven children. He provided for the termination of the trust at the death of the last beneficiary. Following termination, the trust was to be distributed to the testator’s then living descendents according to California’s intestate succession law. Upon termination four grandchildren and two great grandchildren were living. The issue was at what generation the estate should be divided. The Appellants argued that the trust should be divided at the level of the grandchildren since they were the surviving heirs in the nearest degree of kinship to the testator. However, the court construed the statutory language of succession “by right of representation” to mean substitution in an uninterrupted sequence. Thus, the trust was divided at the level of the children even though no children were living.
2. Surviving Heirs

When two persons die in a common disaster, and it is impossible to determine who died first, the common law provides no presumption concerning the order of death. This gap created a difficult problem of fact in cases of intestate succession because survival is a condition to inheriting the decedent's property. The Uniform Simultaneous Death Act, which has been enacted in forty-six states, sought to solve this problem by stipulating that the property of each decedent should be disposed of as if he had lived. However, the presumption of simultaneous death created by the Act arises only when there is no proof that the deaths occurred other than simultaneously.

The Code avoids altogether the need for extensive factual inquiry with its attendant expense and delay. Section 2-104 of the Code creates a general rule that a person must survive the decedent by at least 120 hours before he is entitled to an inheritance. If he dies within the 120 hour period, he is deemed to have predeceased the intestate. Therefore he will receive no property, but his heirs are not excluded from any devise. In those cases in which it is not known whether the person survived the decedent by at least 120 hours, it is presumed that he failed to survive the decedent. If the heir fails to survive the 120 hour period, or is presumed to fail the 120 hour period and is the only heir of the decedent, the estate would go by escheat (§ 2-105). To prevent this result, section 2-104 contains a savings clause which waives the operation of the 120 hour rule where its application would result in the escheat of the estate.

D. Administrative Provisions

Probate proceedings of intestate estates have been criticized because of the cost and delay that such proceedings entail. These two factors are of considerable significance to the public.

---

76G. PALMER, TRUSTS & SUCCESSION, (2ed. 1968) at 186.
77Uniform Simultaneous Death Act § 1. 9C Uniform Laws Annotated.
78See Model Probate Code (1946), Part III: Monographs on Problems in Probate Law, Paul E. Basye, "Dispensing with Administration." M. Sussman, supra note 5, Chapter XII at 13 notes: "The shorter the time in probate, the lower the court costs, the lower the attorney's fees and the fiduciary fee, the more positive are the attitudes of the survivors toward the probate system."
Insofar as the Code seeks to provide the public with an efficient system of transmitting wealth at death, an analysis of the Code’s approach as it affects cost and time is in order.

1. Cost

Although an attorney’s fee may be fair in light of the amount of work necessary to probate an estate under present law, the requirement of a formal court procedure for each step in the disposition of an intestate estate results in sizeable legal fees. The Code’s approach is to take probate out of the court and place the burden of ensuring an accurate and honest distribution of the estate on the beneficiaries and creditors who can invoke a court proceeding to protect their interest.79 The provisions which implement this approach should operate indirectly to reduce the cost of probating an estate.80

a. Appointment of the Personal Representative

Administration of an estate is commenced by an appointment of a personal representative and an issuance of testamentary letters.81 Informal appointment may occur when the registrar82 of the court approves the application a petitioning party.83 Section 3-203 gives the surviving spouse priority for formal or informal appointment as personal representative of the intestate estate. The spouse has the option under Section 3-203 of serving as personal representative or of nominating some other qualified person to serve as personal representative. If there is no spouse, then the surviving heirs of the decedent have equal priority to serve as personal representative.84 In such a situation, the heirs must agree as to who among them will receive the appointment. Where a close relationship exists between the decedent and the

79 U.P.C. Article III, Introduction.
80 This article will focus on the Code’s administrative provisions only as they apply to intestate succession.
81 Testamentary Letters are the formal instruments of appointment given to personal representatives by the Registrar or by court order, upon petition for appointment, empowering them to begin the exercise of their statutory duties. U.P.C. § 3-103.
82 The “Registrar” is either a judge of the court or a person, including the clerk, designated by a written order filed and recorded in the office of the court. U.P.C. §§ 1-201(ii), 1-307.
83 U.P.C. §§ 3-301, 3-302, 3-303.
84 U.P.C. § 3-203.
personal representative, the likelihood of a charge for administration fees is minimal. In the Chicago study, only one spouse who served as an executor of the intestate estate charged a fee; no child of a decedent who served as an executor of an estate charged a fee.\footnote{A. Dunham, supra note 2, at 273-276. Of course, where the spouse receives the entire estate by inheritance, it will not make a great deal of difference if she receives the estate in one sum as a distribution, or in two sums, one representing her administrative fee and the other the net amount available for distribution.} One might expect similar results under the Code.

If an interested party fears that informal appointment will produce a dishonest or inappropriate personal representative, he can block such an appointment by petitioning for a formal appointment which invokes a judicial determination of the personal representative.\footnote{U.P.C. §§ 3-401, 3-414.} Formal appointments are required if one without priority is to be appointed.\footnote{U.P.C. § 3-203(e).} Moreover, when there is no surviving spouse and the heirs cannot reach agreement on who among them should be informally appointed as personal representative, formal appointment offers a means of resolving the dispute.

\textit{b. Personal Representative's Bond}

Under Code section 3-603, bond is generally not required of a personal representative, whether formally or informally appointed. The rationale underlying elimination of a mandatory requirement of bond is that experience has shown that recovery on a bond is very seldom necessary.\footnote{R.V. Wellman, "Probate Bonds and the Uniform Probate Code." Memorandum to Special Committee, Uniform Probate Code (July 8, 1969) at 9, 13.} In the light of this evidence, a statutory bond requirement would be inconsistent with the Code's position that beneficiaries and creditors are expected to protect their own interests.

Drafters of wills for larger estates routinely avoid bond requirements through various clauses, apparently relying on the close relationship between the beneficiaries and the administrator for protection against dishonesty and incompetence.\footnote{Id. at 4, 5.} Since the data of the will studies indicate that most intestate estates will be smaller than the average testate estate, and since the Code expressly encourages appointment of a close family member as
personal representative,\textsuperscript{90} there is equal reason not to require a bond in intestate situations.

If an interested person distrusts the appointed personal representative, the Code provides safeguards. Section 3-603 makes bond for a personal representative necessary if (a) a person who claims an interest in excess of $1,000 demands bond, or (b) the court orders bond in formal proceedings. A court is required by section 3-603 to pass judgment on the need for bond in a formal proceeding. Thus, by petitioning for formal appointment of the personal representative before an informal appointment has occurred an interested person can be assured that a judge will examine the need for bond. Informal appointment cannot occur until five days have elapsed since the decedent’s death.\textsuperscript{91} Section 3-309 authorizes the registrar to deny an application for informal appointment for unspecified reasons. Thus, in a backhand way, the Code vests a public official with discretion to impose a bond requirement prior to any appointment of a personal representative. The elimination of bond in most cases should encourage family members to serve as personal representative in intestate cases, especially where they might otherwise be prevented from serving by the expense of posting bond.

c. Appraising the Estate

The Code eliminates court-appointed appraisers and thereby eliminates an additional charge upon the estate.\textsuperscript{92} Instead, the responsibility for valuing the estate’s assets rests with the personal representative.\textsuperscript{93} If the estate consists primarily of assets which have an easily ascertainable value, such as publicly traded stocks and bonds, the personal representative can appraise the estate without hiring a professional appraiser. This is particularly significant since most intestate estates are small, and usually do not include assets such as business interests and speculative real estate holdings whose value is difficult to appraise.

\textsuperscript{90}U.P.C. § 3-203.
\textsuperscript{91}U.P.C. § 3-307(a).
\textsuperscript{92}U.P.C. § 3-706.
\textsuperscript{93}U.P.C. § 3-706.
d. Other Considerations

A personal representative, whether informally or formally appointed, is a statutory fiduciary vested with complete powers to administer the estate.\(^9_4\) The personal representative, unless appointed in formal proceedings as a "supervised" personal representative,\(^9_5\) is responsible only to creditors and successors of the decedent. He can collect assets, pay debts and death taxes, and distribute the remainder of the estate without judicial intervention.\(^9_6\) This serves indirectly to reduce costs. Insofar as appointment is independent from the probate of an estate, a formally appointed representative can exercise his statutory powers without judicial supervision. However, under section 3-107, any interested person, including the personal representative, can initiate formal probate proceedings which would result in judicial supervision with its attendant costs.\(^9_7\) In such a situation, the scope of formal probate is determined by the petition unless this is proscribed by the Code. Since interested persons could compel continuous judicial supervision, it is possible that there would be only minimal cost savings.

In the Cleveland study, will contests were instituted in only 1.3 percent of the testate cases, and all of these cases were settled. Claims for debts alleged to be due for or against the estate, or assets alleged to belong in probate occurred in only six cases.\(^9_8\) Forty-one percent of all estates grossing between $6,500 and $15,000 showed no creditor's claims in the probate records.\(^9_9\) These facts suggest that in most cases the personal representative of the intestate estate will be able to administer the estate without judicial supervision. Thus, the need for an attorney to guide the estate through the complex steps of a formal court proceeding will be eliminated. The personal representative may well require a lawyer for tax advice, information on informal probate procedures, or guidance in filing papers with the court. However,

\(^9_4\) U.P.C. §§ 3-307, 3-703.
\(^9_5\) A "supervised" personal representative is responsible to the court as well as to interested parties. He is subject to the direction of the court and cannot exercise any of the powers of a personal representative unless ordered by the court.
\(^9_6\) U.P.C. §§ 3-704, 3-709, 3-711, 3-715.
\(^9_7\) U.P.C. §§ 3-401, 3-607, 3-704, 3-721, 3-1001.
\(^9_8\) M. SUSSMAN, supra note 5, Chapter VIII at 19.
\(^9_9\) Id. Chapter VIII at 17.
substantial savings to the estate should result if the basis of the lawyer’s fee changes from a percentage of the estate, as is frequently the current practice, to an hourly charge, since fewer attorney man-hours will be required under the Code’s scheme.

2. Time

The Code differs from most state law in two ways which should result in a more expeditious probate; it employs a short statute of limitations on creditors claims, and it expands the size of the estates which can qualify for small estate administration.

a. Statute of Limitations

The Illinois law applicable at the time of the Chicago study provided a nine month statutory period during which creditors could file claims against the decedent’s estate. Since probate is court-supervised in Illinois, an estate had to remain in probate for a minimum of nine months. Professor Dunham discovered that the modal time required for probate was ten months. In his opinion, the nine month statutory period was the most significant barrier to prompt probate.

Under the Code, the appointment of a personal representative followed by public notice to the estate’s creditors triggers a four month limitation on creditors claims against the decedent’s estate. Since probate under the Code may occur without court supervision, the personal representative could distribute the assets before the termination of the four month period. However, he would be liable for improper distribution, and the distributees may be required to return the property or its proceeds. The four month period is an improvement over most state law and should reduce the time required to probate an estate.

1 Id. at 270-273.
2 Id., supra note 2, at 269.
3 U.P.C. § 3-803(a)(1).
4 U.P.C. §§ 3-712, 3-909.
5 Ohio Rev. Code Ann. § 2113.53 (Page 1953). In Ohio, the statutory limitation on creditor’s claims is six months following the appointment of an administrator. N.Y. Estates, Powers & Trust Law § 11-1.5 (McKinney 1967). New York cuts off creditor’s claims seven months after the appointment of the administrator. Fla. Stat. Ann. § 733.15 (1961) & § 734.04 (1945). In Florida an administrator can distribute the assets of the estate six months after publication of notice to creditors.
b. Small Estate Administration

If an estate qualifies for small estate administration, the personal representative may immediately distribute its assets without notifying creditors since the assets are exempt from creditors' claims. The homestead and family allowances which are available if the decedent's spouse or minor and dependent children survive added to the exempt property provision which applies if the decedent's spouse or children survive would qualify an estate worth $14,500 for small estate administration. The Code has significantly departed from state law by substantially increasing the value of an estate which can qualify for small estate administration. The Cleveland study showed the average intestate estate to be $8,599. Thus, in contrast to state law, the Code's summary procedure should encompass the majority of intestate estates. The personal representative will be able to distribute the estate as soon as he is appointed. The representative may be appointed as early as five days after the decedent's death.

---

CAL. PROB. CODE § 1000 (West 1953). Four months after publication of notice to creditors an administrator can petition a court for permission to distribute the assets of the estate. The court may in its discretion allow a distribution of the entire estate.

U.P.C. § 1203. This section defines small estates as those estates whose value does not exceed the homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent.

The homestead allowance of $5,000 is granted by U.P.C. § 2-401. The decedent's surviving spouse or minor and dependent children are the persons who are entitled to the allowance.

U.P.C. § 2-402 authorizes an exempt property allowance of $3,500. This section stipulates that household furniture, automobiles, furnishings, appliances and personal effects must be selected. If those assets do not yield $3,500 worth of property, then other assets of the estate can be selected to the extent necessary to make up the $3,500 value. The decedent's surviving spouse or children are the recipients of the exempt property.

U.P.C. § 2-403 grants a family allowance to the decedent's spouse and children whom he supported. U.P.C. § 2-404 stipulates that the personal representative can take the family allowance in one lump sum of $6,000, or in monthly installments of $500 for one year.

MICH. COMP. LAWS § 708.29 (1968). Small estate administration in Michigan is limited to estates not exceeding $5,000 consisting of personal property only. OHIO REV. CODE ANN. § 2115.13 (Page 1968). Ohio exempts estates of $2,500 and under from administration provided the decedent's spouse survives. Ohio further restricts the exemption from administration if only the decedent's children survive. N.Y. SURROGATE'S COURT PROCEDURE ACT § 1301 (McKinney 1967). New York has a summary procedure for estates which do not exceed $3,000 and consist of personal property.

See text accompanying note 19 supra.
IV. Conclusion

The Uniform Probate Code's provisions on intestate succession attempt to provide an acceptable estate plan for the man of modest assets who dies intestate by fashioning a pattern of distribution that satisfies the usual wishes of such individuals. The Code has, for the large part, fulfilled this goal. However, the data of the two will studies suggest that certain changes are in order. The following alterations would bring the Code's plan more into line with the general pattern indicated by those studies:

(1) Where the decedent leaves a surviving spouse and children (issue) who are issue of the decedent-spouse marriage, the entire estate should go to the spouse.111

(2) Where the decedent leaves a spouse and a parent(s), but no issue, the spouse should take the entire estate.112

(3) Where a child of the decedent has died, but has left a spouse who has not remarried, such spouse should take the deceased child's share.113

Any state legislature contemplating adoption of the Code should consider these provisions as alternatives to the present Code pattern.114

The Code's estate plan for the small estate owner is conceptually sound and in the public interest. However, it is politically vulnerable. No forceful interest groups have supported the Code's plan, and it is unlikely that any group will. Certainly the

111 See text accompanying notes 46 through 54 supra.
112 See text accompanying notes 40 through 49 supra.
113 See text accompanying note 66 supra.
114 An important objective of the Uniform Probate Code is to achieve uniformity among state probate law. Consequently, a state legislature should change the Code only when important considerations make it necessary. The author believes that the suggested changes warrant serious consideration. However, it should be noted that intestate estates exceeding $50,000 are rare. Only two intestate estates in the Cleveland study had gross assets of $60,000 or more. See M. Sussman, supra note 5, Chapter VIII at 1. The suggestion that the spouse be given the entire estate rather than dividing the balance over $50,000 with the children of the decedent-spouse marriage or parents of the decedent should be evaluated from this perspective.
small estate owner himself exerts little influence in legislative chambers. However, the will studies clearly indicate the need for reform, and the Code has responded with a simple, inexpensive method of distributing the average man’s property to his loved ones. Whether the average man will in fact ever be given the benefits of this plan may well depend upon whether the organized bar promotes the cause of the small estate owner.