



1969

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## Recommended Citation

Robert R. Wright, The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future, 23 Ark. L. Rev. 313 (1969-1970).

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# ARKANSAS LAW REVIEW

and

## BAR ASSOCIATION JOURNAL

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Volume 23

Fall, 1969

Number 3

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### The New Arkansas Inheritance Laws: A Step into the Present with an Eye to the Future

Robert R. Wright\*

*The laws dealing with estates and trusts are a form of community control over the use of wealth. A person who produces or possesses wealth has power to enhance or diminish the security of others. Because of the power wealth carries with it, some form of control by a community over the use of wealth is vital to the welfare of all its members. While facts existing at a particular time and place determine the ends which a community seeks through control of wealth and the techniques of control it applies, these facts always include the experience gained by the community from past efforts to control wealth processes. There must be a constant redefinition of the ends of control in the light of community experience. Existing techniques of control must be appraised and modified and new techniques must be invented to attain the ends as redefined.*

Richie, Alford & Effland,  
*Decedents' Estates and Trusts* 7 (3d ed. 1967)

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*But, lastly, the most universal and effectual way of discovering the true meaning of a law . . . is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.*

*Blackstone, Commentaries, Book I, at 61 (1765)*

One of the less publicized gambits of the Arkansas General Assembly of 1969 was to pass House Bill 448, "An Act to Amend the Inheritance Laws of the State of Arkansas," which was signed by the Governor and became Act 303 of 1969. While the goodhearted, latter-day Puritans and part-time clerics worried about the deleterious effects which a local option mixed-drink bill might sow among an otherwise spiritually inclined citizenry, while the Governor brooded about the need for greater tax revenues and the legislature pondered how much they could produce without offending a tax-conscious electorate, and while a convention to chart a new organic course for the State waited quietly in the wings, one of the least noticed and less controversial bills to glide through the legislative gauntlet was this act altering a number of salient aspects of Arkansas property law with particular reference to the law of descent and distribution. When clerics have long since become acclimated to the spectacle of people sampling the quality of the martinis served at the Little Rock Embers, when Arkansas has either solved its tax problems or has promoted all of its colleges to the rank of "university" to more effectively disguise their inadequacies, the effect of these new inheritance provisions will still be felt. This is not to say that the changes made are all that sweeping; but simply that they are important, and that they will ultimately touch the lives of all Arkansans, who like other mortals must live and die and who, to whatever degree they observed the laws of society during life, will most certainly die by them.

These new inheritance provisions were the product of a committee<sup>1</sup> of the Arkansas Bar Association, but the truth of the matter is that the bulk of the thinking and the vast majority of the wording came from the mind and pen of Harry E. Meek, who

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1. The members of the committee were Owen C. Pearce, Chairman; Harry E. Meek, Honorary Chairman; Frank C. Bridges, Jr.; Chancellor Thomas F. Butt; Oliver Clegg; Ben Core; Julian Fogleman; Richard B. McCulloch; Duval L. Purkins; Chancellor Murray Reed; Charles B. Roskopf; Leonard L. Scott; James B. Sharp, H. Franklin Waters; Chancellor Royce Weisenberger; and the author.

most lawyers would concede has a greater grasp of the Arkansas law of property, its oddities and quirks and pitfalls and dark alleys, than any other living man. The legal profession in Arkansas owes a lasting debt to the genius and wit of Harry Meek, and whatever limited critical commentary may be developed in this article should never detract from that fact. Mr. Meek has made so many contributions to the law of Arkansas that his service to the Bar, and through its auspices to the public in general, has made up for the lesser efforts of many of us. He is a lawyer's lawyer in every sense of the phrase. Similar credit should be paid to the committee chairman, Owen C. Pearce, who kept after the committee to get the job done.

One more prefatory observation is also relevant. The committee dealt in terms of political realities, with what it thought the legislature and the Bar would be willing to buy at this time and in this draft. Also, the committee was fighting a time limitation. It was never the thought that what was accomplished was the "be all" and "end all" in terms of the total picture. The committee's work is not finished. What some of us would have liked to have done, however, we felt we could not do or did not have time to do at this juncture. It may be well to summarize at the beginning some of the general impressions that can be derived from the new inheritance provisions before venturing into the swampland of specifics:

1. One of the better things the new provisions accomplished was to clarify much of what previously had been confusing, uncertain and had provided grist for the mill of faculty and student writers of countless law review generations.
2. Another major benefit accomplished by the new provisions was to abolish, with a limited exception, ancestral estates, which by this time had almost become an institution limited to Arkansas.
3. A major change, which will likely be much debated, was to elevate the surviving spouse to the position of an heir of the intestate deceased, and in a way which is somewhat peculiar to this jurisdiction.
4. A substantial change, though less important in reality than in theory, was to limit heirship, whereas previously in Arkansas, heirship had been unlimited.
5. Other important changes involved the correction of some ambiguities or improprieties in existing law in the hope of bringing it more in accord with modern tendencies.

With this out of the way, we can turn to some of the specifics which the Act accomplished.

## I. CHINKING UP SOME HOLES

A. *The Historical Predicate*

The modern tendency, which is manifested in the Uniform Probate Code adopted by the National Conference of Commissioners on Uniform State Laws, is to eliminate the distinction between real and personal property. The reason is quite simple: times have changed. After the Normans had conquered the Saxons at Hastings in 1066, led by William the Bastard, the son of Robert the Devil,<sup>2</sup> and the Saxon lands had passed in large measure to the King and had been parceled out to Norman nobles,<sup>3</sup> the feudal system and the tenurial concept flowered like a rare black rose.<sup>4</sup> Like all roses, whatever their color, it gradually withered and died, but its characteristics and its product lived on to control and haunt generations to come. They were bound by its precepts, and the thoughts and conditions and rules of dead men controlled the lives and property of men who lived and withered and joined them in the cemetery. Generations and

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2. W. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 4 (1965), refers to William the Conqueror's less well-known appellation, pointing out that he was the "illegitimate son of Duke Robert 'the Devil.'" Robert was also known as "the Magnificent," which possibly served to balance things a bit.

3. *Id.* at 7: "And so Harold had died, and with him the Saxon civilization. For William understood, as he turned inland from the battlefield, that there could be no half measures if his reign was to be made secure; the whole of England must be infiltrated and the Saxon power destroyed forever. The English had hazarded everything at Hastings, and they had lost everything; now earldoms which had been established only a few generations after the last Romans had departed from Britain, and had survived and absorbed Danish and other Scandinavian adventurers, were to be supplanted by Norman baronies. \* \* \* The England into which William advanced was the product of a thousand years of sporadic invasions; he intended that his would be the last."

Some Saxon lords were permitted to redeem their lands in whole or in part. "But by far the greater portion of the English estates were appropriated by the Norman Conqueror and went to his followers. . . . But the central fact was that the grants themselves came from the crown. . . . William, as king, was now an anointed sovereign, and all men were henceforth his tenants, holding their estates of him." *Id.* at 11.

4. "With this absolute control of land, the essential commodity, William could give full effect to the moral, personal, and military commitments embodied in the ritual of homage. This binding ceremony was well established by the Conqueror's day and epitomized the *mystique* of the feudal age. \* \* \* This intricately stratified organization of tenancy affected only the upper fraction of Norman England; but the feudal law prescribed the duties of the humble as well as the privileged. \* \* \* For the average man, these duties were elaborately detailed and rigidly enforced." *Id.* at 11-13.

centuries passed. Sir Edward Coke,<sup>5</sup> a strange contradiction who could both fight for the principal "modern" precepts of Magna Carta<sup>6</sup> and deliver the classic exposition of the common law of the remote English past,<sup>7</sup> manifested an impact which carried over into Blackstone's Commentaries and through Blackstone into America.<sup>8</sup> Thus did we acquire the English land law as it existed in the seventeenth century, and what we did not inherit in this fashion, we made certain we acquired through reception

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5. Coke was Solicitor General and later Attorney General to Queen Elizabeth I, and served as Chief Justice of the Common Pleas and Chief Justice of the King's Bench under King James I. See 3 POUND, JURISPRUDENCE 428 (1959). Between his service as Solicitor General and Attorney General, he served also as Speaker of the House of Commons. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 242 (1956).

6. As Professor Swindler observes, "Sir Edward had undergone a revelation, upon his elevation to the chief justiceship of the Common Pleas, as Thomas á Becket had experienced when he had been consecrated Archbishop. Both men had been, prior to this transfiguration, vigorous supporters of a dominating monarchy; both had then had a complete change in the perspective with which they viewed the royal prerogatives." SWINDLER, *supra* note 2, at 172. King James ultimately dismissed Coke from office for failing to obey his will in a case involving the Bishop of Coventry. As time passed, and as the issue grew between the King and Parliament of whether the King or the law was supreme in England, Coke, by then in his seventies, led the fight against the King that culminated in the passage of the Petition of Right. At possibly the high point of the debate, Coke uttered the famous words: "I know that prerogative is part of the law, but sovereign power is no Parliamentary word; in my opinion, it weakens Magna Carta and all our statutes; for they are absolute without any saving of sovereign power. And shall we now add to it, we shall weaken the foundation of Law, and then the building must needs fall; take we heed what we yield unto—Magna Carta is such a Fellow, he will have no Sovereign." (As quoted in SWINDLER, *supra* note 2 at 185).

7. See 5 HOLDSWORTH, A HISTORY OF ENGLISH LAW 423-493 (2d ed. 1937). Pound stated that Coke's Institutes were "books of authority wherever the common law obtains." 3 POUND, *supra* note 5. Plucknett observed that Coke "established his reputation by sheer weight of learning," and that his influence was such that it "made for the establishment of a supreme common law." PLUCKNETT, *supra* note 5 at 282, 284. Professor Radin viewed Coke's statements as "a point of departure for the Common Law from the seventeenth century on." M. RADIN, ANGLo AMERICAN LEGAL HISTORY 266 (1936). Coke's outlook was often more medieval than modern, but "the sum total of his presence was to elevate the common law to a status which it never had before; to systematize it and yet constrict it; and at the same time to form the philosophical bridge from the middle ages to the modern era." R. WRIGHT, THE LAW OF AIRSPACE 33 (1968).

8. Pound states: "Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769) was much used in America . . . and was accepted by the courts after the Revolution as a statement of the law which we received." See 3 POUND, *supra* note 5. Of course, Blackstone relied heavily upon Coke.

statutes.<sup>9</sup> By the nineteenth century, land law in Britain was changing by leaps and bounds,<sup>10</sup> but many American jurisdictions remained more English than England.<sup>11</sup> This was particularly true in the South with its plantation economy, tied as it was to land as a primary means of wealth. We brought Sir Walter Scott to America with us, and we gave him a Southern accent and enshrined his chivalry and the system of his time as our own. But it was not purely a Southern phenomenon. Early America was a society in which there was a scarcity of fluid capital, in which there was no credit-oriented economy in the sense that we know it today. Taxation had not yet developed as it ultimately would. The federal government had one prime resource—western land ceded to it by the original thirteen states—and it “spent” this resource to create capital and credit where there was none, to open a wilderness to cultivation, to build a transportation industry based on the steam locomotive, to overcome a scarcity of labor and capital in society.<sup>12</sup> Small wonder that in the early days of America, land was of prime significance among the assets a man might accumulate. But along toward the end of the nineteenth century, we turned the corner; we ultimately overcame economic scarcity; we underwent an industrial revolution and began a growth toward an urban society; we developed taxation and credit and with them a multiplicity of economic options. The modern corporation began to develop

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9. In Arkansas, ARK. STAT. ANN. § 1-101 (1956 Repl.). See also MO. ANN. STAT. § 1.010 (Supp. 1968) and TEX. REV. CIV. STAT. ANN. art. 1 (1969).

10. E.g., the Fines and Recoveries Act of 1833, 3 & 4 Will. 4, c. 74 (1833), provided a method of disentailing an estate in fee tail by permitting the tenant in tail to convey an estate in fee simple if he had present possession. The Doctrine of Worthier Title was also abolished in England in 1833. See L. SIMES & A. SMITH, *FUTURE INTERESTS* § 1612 (2d ed. 1956), citing 3 & 4 Will. 4, c. 106, § 3 (1833); but compare, Comment, *The Doctrine of Worthier Title in Arkansas*, 21 ARK. L. REV. 394, 406-407, fn. 88 (1967). The rule on the destructibility of contingent remainders was abolished as it applied to premature termination of the supporting life estate in the Real Property Act of 1845, 8 & 9 Vict., c. 106, § 8 (1845), and as it applied to those remainders which failed to vest upon natural termination of the life estate in the Contingent Remainders Act of 1877, 40 & 41 Vict., c. 33, § 1 (1877). See Fetters, *Destructibility of Contingent Remainders*, 21 ARK. L. REV. 145, 149 (1967). The British retained the Rule in Shelley's Case until 1925, when it was abolished in the Property Act of that year, 15 Geo. V., c. 20, § 131 (1925).

11. E.g., Arkansas. See Wright, *Medieval Law in the Age of Space: Some "Rules of Property" in Arkansas*, 22 ARK. L. REV. 248 (1968).

12. On this subject generally, see W. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* (1960).

and proliferate. Henry Ford and mass production came along. Suddenly, land was no longer the prime economic asset. It might be equaled or surpassed in value by printed pieces of paper in the form of stock certificates or negotiable instruments or bank certificates representing gold or silver. Times had changed, but the property laws by and large had not.

But now they have in large measure. Now we know—and the Arkansas Probate Code has recognized<sup>13</sup>—that for all its lasting value, land might in some circumstances be a lesser article of value. Both delta and hill land (excepting that in Conway County, Arkansas,<sup>14</sup> of course) might be of lesser value than a handful of stock certificates. It may be said that this is the product of an essentially urban society; but the fact of the matter is that it is the product of an essentially modern, credit-oriented economy, whether urban or rural. In this situation the distinctions between real and personal property, particularly in the probate or inheritance context, become more artificial and less realistic.

### B. Definition of "Heirs"

In keeping with this fact of modern life, the new inheritance provisions speak in terms of "heirs" or an "heir."<sup>15</sup> Mr. Meek's comment was that it might seem "illogical" to apply the designation to those inheriting personalty, but he found it a "convenience of draftmanship."<sup>16</sup> The death of the distinction is overdue, because the reason for it no longer prevails. In the most

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13. Under ARK. STAT. ANN. § 62-2401 (Supp. 1967), real property is an asset in the hands of the personal representative if the will directs or if "the court finds that such property should be sold, mortgaged, leased or exchanged for any purpose enumerated . . . irrespective of whether personal property of the estate (other than money) is available for such purpose." Especially noteworthy in this respect is the preamble to ARK. ACTS 1961, No. 424, which stated: "Whereas, due to the changed nature of the economy of Arkansas, it is no longer true that real property constitutes the sound core of the assets of most estates; and in many instances the estate of a decedent now includes investments represented by personal property more desirable than certain types of real property to be preserved for distribution . . ." and so on.

14. See *Arkansas State Highway Commission v. Hawkins*, 246 Ark. 55, 437 S.W.2d 463 (1969), and read the dissent of Justice George Rose Smith.

15. No. 303, [1969] Ark. Acts § 1.

16. It was also pointed out in the comment to section one that no prefatory section of this type is found in the present laws. For the time of vesting of both realty and personalty in the heirs, see *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950), cited by Mr. Meek.

recent draft of the Uniform Probate Code, "property" is defined as "both real and personal property and means anything that may be the subject of ownership" and thereafter, no distinction is made.<sup>17</sup> Moreover, it is observed: "It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner."<sup>18</sup> Thus, if anything, the new provisions on "heirs" remains behind the trend although true to current law in that real estate "passes immediately to the heirs" of the intestate subject to the personal representative's right to sell it for payment of debts, while personalty passes to the personal representative.<sup>19</sup>

### C. "Descendants" and "Dying Intestate"

Section two of the new Act defines "dying intestate,"<sup>20</sup> although it adds nothing of substance except that the present statute does not define it. Similarly, section three defines "descendants" as those in a direct line of lineal descent from the intestate,<sup>21</sup> this being done for the reason that (a) some courts did not know what the word meant; (b) the committee wanted to make it clear that the term included adopted children; and (c) it was deemed desirable also to state that the "descendants" of a living descendant could not take.<sup>22</sup> Much or even all of this section, it might be argued, was not necessary, except for the remote possibility that an Arkansas court, during a momentary lapse of judgment, might misinterpret the law or render an unfortunate decision. That this thought might perish, the section was included.

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17. UNIFORM PROBATE CODE, Fifth Working Draft, § 1-201(aa) (1969).

18. *Id.* at 22 (General comment to Art. II, part 1).

19. No. 303, [1969] Ark. Acts § 1. See also, ARK. STAT. ANN. § 62-2401 (Supp. 1967) with which this provision is consistent.

20. No. 303, [1969] Ark. Acts § 2.

21. *Id.* at § 3.

22. With regard to the first reason, the term had been used to refer to property "descending" to collaterals or to refer to inheriting collaterals as "descendants." This is noted in the comment, which cites no Arkansas cases in this regard, but cites C.J.S. and an Ohio case. The definition of "descendants" in the Act specifically excludes "an Intestate's ascendants or collateral relatives" and specifically includes "adopted children (and their descendants) of the Intestate." In part (b) of the section, it is stated that the descendants of a living descendant "shall be excluded from the class," this being seemingly obvious but set forth due to the desire of the committee "to make it emphatic" that an intestate's grandchild cannot inherit while the intestate's child (the parent of the grandchild) is still living. (From committee comment to § 3).

## D. "Per Capita" and "Per Stirpes"

In dealing in sections four and five with the terms, "per capita" and "per stirpes," it was the aim of the committee to clarify existing law and to make the meaning and application of these terms readily discernible. These terms had not been previously defined by statute in Arkansas,<sup>23</sup> although judicial definitions and interpretations had been developed.<sup>24</sup> Section four of the new inheritance provisions states that if all the members of the class who inherit property from an intestate "are related to the Intestate in equal degree, they will inherit the Intestate's estate in equal shares, and will be said to take *per capita*."<sup>25</sup> Having said this, the committee had probably said enough. But it was desired to leave no doubt about the matter, and for this reason the unusual drafting approach was adopted of providing an *example* of the rule within the statute itself: "For illustration, if the Intestate leaves no heirs except children, the children will take *per capita* and in equal shares; if he leaves no heirs except grandchildren all the grandchildren will take *per capita* and in equal shares; if the inheriting class consists solely of great grandchildren, or any more remote descendants of the Intestate who are all related to him in the same degree, they will take *per capita*."<sup>26</sup> The same rule was applied by the statute to inheritance by collateral heirs of the intestate, and this too was illustrated in detail. It was also stated that if the inheriting class consisted of uncles, aunts and grandparents (all of whom constitute a class under the descent provisions), they would take *per capita*. In the committee comment written by Mr. Meek, the reason for spelling this out so thoroughly was revealed:

Suppose the Intestate had only two children, both of whom

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23. However, ARK. STAT. ANN. §§ 61-108, 61-109 (1947) had made provision in the *per stirpes* situation as to descendants, it being stated in the former statute that if some children of an intestate be living and some be dead, "the inheritance shall descend to the children who are living and the descendants of such children as shall have died . . . so that the descendants of each child who shall be dead shall inherit the same their parent would have received if living." The latter statute provided that this rule of descent would apply in all cases where the "descendants of the intestate, entitled to share . . . shall be in equal degrees of consanguinity. . . ." Although these old statutes referred to descendants of the intestate, the same principles were applied to collaterals in *Daniels v. Johnson*, 216 Ark. 374, 226 S.W.2d 571, 15 A.L.R.2d 1402 (1950).

24. See the old landmark case of *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1855), and *Daniels v. Johnson*, *supra* note 23.

25. No. 303, [1969] Ark. Acts § 4(a).

26. *Id.*

predeceased him: One of these children (child "A") left nine children, the other (child "B") left one child. In this situation, the Intestate's ten grandchildren are all related to him in the same degree and will take *per capita*—each child taking a one-tenth interest. In the past there has been some confusion of opinion on this point; and some attorneys have assumed that nine children of child "A" would take collectively a one-half interest, and the one child of child "B" would take a full half interest. This conclusion would not be correct. All the grandchildren being related to the Intestate in the same degree, they take *per capita*, and in their own right, and not *per stirpes*, or through the right of representation. See Blackstone's Commentaries, Book II, Page 218; Garrett v. Bean, 51 Ark. 52, 9 S.W. 435. In other words, each of the ten children would take a one-tenth part in the assumed situation.<sup>27</sup>

The (b) part of section four provided that if the heirs were related to the intestate in unequal degree, the ones in the nearer degree would take *per capita* while those in the more remote degree would take *per stirpes*.<sup>28</sup> Related to this is section five providing that heirs will take *per stirpes* in several situations. One is where the intestate is predeceased by a person or persons who would have inherited if they had survived and who leave descendants surviving the intestate. Here, the estate is divided into as many equal shares as there are surviving heirs in the nearest degree of kinship and persons in the same degree of kinship who predeceased the intestate leaving descendants. The descendants of the predeceased persons collectively receive the share of their ancestor. Thus, these descendants take *per stirpes* while the surviving heirs in the nearest degree to the intestate take *per capita*. It is as if the predeceased persons having descendants had not died at all and had shared *per capita*, in equal parts, with the surviving heirs of the nearest degree, but then had themselves died intestate immediately following and thus passed on their shares to their respective descendants. As for the descendants of the predeceased person, they take his share in equal parts if they are all related in the same degree. But what if some of *them* are children and some are the issue of deceased children? Then again, the same rule is applied, and the accrued share passes *per capita* to those in the nearer degree, and *per stirpes* to those of the more remote relationship. Why is this spelled out in such detail? Mr. Meek observes in the comment that it is "rather careless" simply to say that the descendants will take the share their deceased parent would have taken because of the problem of successive *per stirpes* situations.

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27. Committee comment to ARK. ACTS 1969, § 4.

28. No. 303, [1969] Ark. Acts § 4(b).

The answer then is that "in each generation if necessary," the same general formula is applied.<sup>29</sup> As the Act states, "if the descendants of a predeceased person be found in multiple generations, the above formula for division shall be applied in respect to the descendants in each generation."<sup>30</sup>

These provisions apply to both real and personal property and to both lineal and collateral heirs. Moreover, if the inheriting class consist of grandparents, uncles and aunts, it applies to the descendants of predeceased uncles or aunts, although not to the descendants of predeceased grandparents. The same is true of great grandparents, great uncles and great aunts.<sup>31</sup>

The sum total of these provisions is to eliminate some of the difficulties and inequities which have occurred in other courts. For example, in a California case, *Maud v. Catherwood*,<sup>32</sup> the heirs were surviving grandchildren and great-grandchildren. The court ruled that because the survivors were not of equal degrees, they all took by representation. To take *per capita*, they all had to be related in the same degree. When traced to the common ancestors of equal degrees (the deceased children), the result was that three of the grandchildren and one great-grandchild received one-eighth, while one grandchild and one great-grandchild received one-fourth. This followed a California statute stating that if all of the descendants were in the same degree of kindred, they would share equally, but otherwise they took by representation. The Arkansas provisions obviously avoid such a result.<sup>33</sup>

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29. Committee comment to No. 303, [1969] Ark. Acts § 5. Quite obviously, this statute is detailed in comparison to the older statutes cited in note 23, *supra*, and seeks to tie up all the loose ends which might previously have existed.

30. No. 303, [1969] Ark. Acts § 5(b).

31. *Id.* at § 5(c). The Act goes into extensive, seemingly needless, detail on this point. However, as the comment states: "It is felt that the statute should spell out the extent to which the *per stirpes* rule applies where the inheriting class consists of grandparents, uncles and aunts, or great grandparents, great uncles and great aunts, because these are situations where persons in different generations inherit as coheirs. Our present statute (Section 61-101) uses the words 'grandfather, grandmother, uncles and aunts and their descendants in equal parts'; but it seems that under this present statute the 'descendants' are admitted to the inheritance only when they take *per stirpes*." *Scull v. Vaugine*, 15 Ark. 695; *Kelly's Heirs v. McGuire*, 15 Ark. 555."

32. 67 Cal. App. 2d 636, 155 P.2d 111 (1945), noted in 33 CAL. L. REV. 324 (1945).

33. Under § 5(a) of the Arkansas Act, the heirs in *Maud v. Catherwood* would have each received one-sixth.

E. *Transmissible Interests*

Section seven of the Act is designed to eliminate much of the doubt that has built up as to the interests which may pass by inheritance and those which may not. Ben Core plunged into this milieu in a 1951 article in the *Arkansas Law Review*.<sup>34</sup> On the subject of possibilities of reverter (which passed to the heirs at the common law),<sup>35</sup> he observed that in *Fletcher v. Ferrill*,<sup>36</sup> the Arkansas Court stated it took no position on whether a possibility of reverter passed to the heirs under the statute of descent.<sup>37</sup> He noted, however, that previous Arkansas cases "are strongly indicative that these interests have been doing that very thing for a number of years."<sup>38</sup> In *Davis v. Davis*,<sup>39</sup> a 1951 case, the Arkansas Court ruled that a reversionary interest could pass by inheritance, citing the article by Mr. Core as authority for the proposition. This case, however, involved a reversion, not a possibility of reverter (which is a characteristic only of a determinable fee).<sup>40</sup> The majority opinion observed that in an earlier case, *LeSieur v. Spikes*,<sup>41</sup> the court had "inadvertently remarked that such an interest is a possibility of reverter (instead of a reversion) and that it is not disposable."<sup>42</sup> Prior to this, the court on rehearing in *Fletcher v. Ferrill*<sup>43</sup> had distinguished *LeSieur* on the basis that in *Fletcher* it had held that a possibility of reverter may be devised, whereas in *LeSieur* a will was not involved. Also, "the statement was merely *dictum*" in *LeSieur* because "Dixie LeSieur in fact was survived by heirs of her body and therefore it was unnecessary to decide whether a possibility of reverter can be transferred by deed."<sup>44</sup> In *Hutchison v. Shep-*

34. Core, *Transmissibility of Certain Contingent Future Interests*, 5 ARK. L. REV. 111 (1951).

35. See 23 AM. JUR. 2d, *Descent and Distribution*, § 33 (1965); RESTATEMENT, PROPERTY § 164, comments (a) and (c) (1936).

36. 216 Ark. 583, 227 S.W.2d 449 (1950).

37. Core, *supra* note 34, at 116. (The Arkansas court said, however, that a possibility of reverter was subject to devise.)

38. *Id.*

39. 219 Ark. 623, 243 S.W.2d 739 (1951).

40. It also remains in the grantor of an estate in fee simple conditional in those few states which still recognize such an estate. See 23 AM. JUR. 2d 21, *Descent and Distribution*, § 33 (1965). Arkansas, of course, does not have the fee simple conditional, and so in Arkansas the possibility of reverter remains only in the grantor of a fee simple determinable.

41. 117 Ark. 366, 175 S.W. 413 (1915). See also Fetters, *supra* note 10, at 154-155.

42. 219 Ark. 623, 625, 243 S.W.2d 739 (1951).

43. 216 Ark. 583, 591, 227 S.W.2d 449, 453 (1950).

44. *Id.*

*pard*,<sup>45</sup> a few years after the *Davis* case, the court again stated that a "divestable reversion" "may be transferred by deed or by will and is a subject of inheritance upon the reversioner's death intestate."<sup>46</sup> Again, however, this did not answer the question as to the possibility of reverter, and the status of the law was dependent only on the common law rule that a possibility of reverter passed to the heirs and the hunch that the court would follow Ben Core's article, as it had in both *Davis* and *Hutchison*. The fact that in *Fletcher* the court had chosen to state that it took no position on the subject left the matter clouded. Similar doubt existed as to a right of re-entry for condition broken,<sup>47</sup> although the Restatement took the position that this could pass by inheritance<sup>48</sup> (which was the same position it adopted on the possibility of reverter). In the case of executory interests, there was similar doubt, even though the courts seemed not to doubt that they were descendible once the validity of these interests had been recognized.<sup>49</sup>

In any event section seven puts any doubts to rest. It provides that "every right, title and interest" in both realty and personalty which the intestate's death does not terminate may be inherited.<sup>50</sup> (This is subject, of course, to testamentary dis-

45. 225 Ark. 14, 279 S.W.2d 33 (1955).

46. 225 Ark. 14, 21, 279 S.W.2d 33 (1955).

47. The right of re-entry for condition broken or power of termination is retained by the grantor in a fee simple upon condition subsequent. The conveyance is "upon condition that" the event does not occur. If the event occurs, the grantor must take the initiative in exercising his right of re-entry or power of termination. On this, see *Moore v. Sharp*, 91 Ark. 407, 121 S.W. 341 (1909). Thus, the right of re-entry theoretically differs from a possibility of reverter in which the estate reverts automatically upon the occurrence of the event. Practically speaking, there is probably going to be a lawsuit in either event.

48. RESTATEMENT, PROPERTY § 164, comment (a) (1936).

49. See 20 ARK. L. REV. 190 (1966), citing *Goodtitled Gurnall v Wood, Willes* 211, 125 Eng. Rep. 1136 (C.P. 1740).

50. It should be generally noted, although these sections would no seem to call for extended discussion in the text, that section eight of Act 303 provides that an intestate may transmit title by inheritance even though he is not in actual or constructive possession and even though someone is in adverse possession. The committee comment note that under the common law, the ancestor had to be in actual or constructive possession, but that this rule has never been followed in Arkansas (citing *Kelly's Heirs v. McGuire*, *supra* note 24, at 585; ARK. STAT. ANN. § 50-408 (1947); and ARK. STAT. ANN. § 61-101 (1947)).

Section nine of the Act provides that where real or personal property is passed by inheritance to two or more persons, they take as tenants in common (unless it involves personalty distributed in separate units by a personal representative). This is simply a rewritten, clarific

position of such property, as well as to the various rights of the surviving spouse and children and to the administration of the estate.) So that no doubt would be left on the subject, the Act spells it out that "the Intestate's entire right and title in respect to any and all reversionary and remainder interests, rights of re-entry or forfeiture for condition broken, executory interests and possibilities of reverter, whether any of such interests be vested or contingent, shall be transmissible by inheritance and will pass to the Intestate's heirs determined as of the time of his death."<sup>51</sup> Clearly, this is in keeping with the modern trend and represents the better rule. It gives the broadest possible rights in the heirs with respect to both the real and personal estate of the intestate deceased. The sweeping nature of the language leaves no doubt that the committee intended that all types of property interests which death does not terminate should be able to pass in absence of will by descent and distribution. The language is of such force that it takes care of some ancillary questions which might otherwise be raised in connection with these interests—such as whether a power of termination (right of re-entry) is transmissible before the condition is broken. Until or unless the condition subsequent is broken, the right to re-enter lies dormant; it may be said to be contingent upon the breaking of the condition. Section seven makes all of these interests, whether vested or contingent, subject to inheritance. It is thus immaterial whether the condition is breached in the lifetime of the grantor. Note, however, that these new inheritance provisions apply on their face only to intestacy. They seemingly have no bearing on the current status of the law with respect to the transmissibility of these interests by will or inter vivos instruments. This is somewhat illusory, however. It would be wholly illogical to say that these rights and interests may be inherited but not devised. Moreover, with respect to inter vivos conveyances, the Arkansas statutes provide that "all lands, tenements and hereditaments may be aliened and possession thereof transferred by deed."<sup>52</sup> A "hereditament" is "whatever, upon the death of the owner, passes, in the absence of disposition by will, by act of law, to the heir," and may in some jurisdictions include

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version of ARK. STAT. ANN. § 61-115 (1947).

Section ten states that in inheritance, the male is not to be preferred over the female. The committee comment notes that although the contrary was true under the common law canons of descent, "Act 52 of 1933 and Act 117 of 1937 removed this preference."

51. No. 303, [1969] Ark. Acts § 7.

52. ARK. STAT. ANN. § 50-401 (1947).

personal property.<sup>53</sup> The effect of section seven, therefore, is to make all of these rights and interests subject *not only* to inheritance by the heirs of the intestate *but also* freely alienable by deed, when this section is read in conjunction with this existing statute.

By definition, the inheritability of "every right, title and interest" in real or personal property must necessarily include interests both legal and equitable in nature. A "right" is simply a legally enforceable claim of one person against another with the result that the other either is obligated to perform or not to perform a given act.<sup>54</sup> Moreover, as the Restatement points out, interests "are legal or equitable."<sup>55</sup> Under the principle of equitable conversion, when a seller and purchaser enter into a legally enforceable contract for the sale of land, the equitable title automatically passes by operation of law to the purchaser. The purchaser is entitled to receive the legal title when the contract is consummated, and until consummated the seller holds the bare legal title and has the right to receive the proceeds or balance of the proceeds of the sale as well as any other obligations the purchaser may have assumed under the contract.<sup>56</sup> Consequently, it was unnecessary to state that "*every* right, title and interest" included those both legal and equitable, since one would have to hearken all the way back to Lord Coke's antipathy for equity (and in fact, even beyond) to attempt to reach a conclusion to the contrary.<sup>57</sup>

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53. 1 H. TIFFANY, REAL PROPERTY § 10 (3d ed., Jones ed., 1939).

54. RESTATEMENT, PROPERTY § 1 (1936).

55. *Id.*, § 6.

56. See W. WALSH, EQUITY § 86 (1930).

57. WALSH, *supra* note 56, states: "On the death of the purchaser prior to the transfer of title under the contract, his equitable estate passes either to his devisees or devisee under his will, or to his heirs if he dies intestate, subject to the lien of the vendor as mortgagee in equity for payment of the purchase price, the personal representative being required to pay the purchase money out of the personal estate of the purchaser. \* \* \* If the vendor dies pending performance of the contract, whether before or after the day fixed for closing, his legal title as trustee passes to his heirs or devisees, as the case may be, subject to the trust in favor of the purchaser, his heirs, devisees or assigns, and the dower right of his widow. In other words no beneficial right therein passes to the heirs or devisees of the vendor and his widow has no right of dower. He dies the owner of a chose in action for the purchase money, which passes as personal property to his executor or administrator for the benefit of his legatees or next of kin, secured by the legal title which he held as mortgagee, and which his heirs or devisees hold on his death for the benefit of the legatees or next of kin."

Walsh also points out that specific performance of contracts "took form as one of the earliest and most important branches of equity, in

### F. *Illegitimate Children*

Much of the existing scheme of things was incorporated into the new provisions on illegitimates. It had been provided that illegitimates could inherit and transmit an inheritance *ex parte materna*, as if they had been legitimate, but *not ex parte paterna*.<sup>58</sup> This rule was retained in section eleven in subparagraphs (d) and (e), although with some clarifying language which stated the existing situation in Arkansas based upon the superseded provision and case interpretations. Subparagraph (d) stated that the illegitimate or his descendants might inherit realty or personalty from the mother or her blood kindred as if legitimate, but not from the father or his kindred. Subparagraph (e) provided that the property of an illegitimate dying intestate would pass (in accord with the usual rules of intestacy) to the mother and her blood kindred, but the father or his blood kindred could not inherit from the illegitimate or his descendants. Although subparagraph (e), unlike (d), did not state that the property of the illegitimate "*or his descendants*" would pass only to the mother and her kindred (subject to the intestacy rules), presumably the inclusion of the prohibition against inheritance from the descendants by the father and his kin takes care of this situation. The current Arkansas statute<sup>59</sup> providing that the issue of marriages "deemed null in law or dissolved by divorce" would be legitimate is retained in a reworded form in subparagraph (a). The new provision is that if the parents "have lived together as man and wife" and before the birth "participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed," the offspring is legitimate as to both parents even though the marriage is void.<sup>60</sup> In addition, there is a presump-

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the fifteenth century, the century in which equity as a part of the English legal system had its real beginning." *Id.* at § 58. He added: "Coke insisted that either party to a contract has an option to perform or pay damages, and that specific performance enforced by the Chancellor deprived him of this right. [Citing *Bromage v. Genning*, 1 Rolle 368, 81 Eng. Rep. 540 (1616).] This crude standard of business morality never made any headway in the law." *Id.*

58. ARK. STAT. ANN. § 61-103 (1947). See Meek, *Descent and Distribution*, ARKANSAS DESK BOOK 40 (1961).

59. ARK. STAT. ANN. § 61-104 (1947). See Walker, *Legitimacy and Paternity*, 14 ARK. L. REV. 55 (1959); and Comment, *The Effect of Void and Voidable Marriages in Arkansas*, 10 ARK. L. REV. 188 (1956).

60. This is in accord with the existing Arkansas cases. See, e.g., *Yocum v. Holmes*, 222 Ark. 251, 258 S.W.2d 535 (1953); *Bruno v. Bruno*, 221 Ark. 759, 256 S.W.2d 341 (1953); and *Daniels v. Johnson*, *supra* note 23. But if the parents were never married, the offspring would be

tion that a child born or conceived during marriage is the legitimate child of both spouses. This is partly expressive of the common-law presumption that a child of a lawfully married couple is presumed to be the husband's.<sup>61</sup> This also is the rule followed in the Arkansas cases.<sup>62</sup> Note, however, that the statute also includes children conceived during marriage. This takes care of the situation in which the spouses were divorced before the child was born, as did the previous statute, but it also means that if the husband divorces the wife on grounds of adultery (or any other grounds), a child conceived before the dissolution of the marriage is presumed to be the child of the divorced partners. That the previous statute apparently meant the same does not ease the sting. If the husband believes that the child was the product of an adulterous relationship, the burden is on him to establish that fact in court or the child will be his heir. Of course, a husband in such a situation might choose the easier course of disinheriting the child in a will, perhaps also reciting that although he is disinheriting the child, he does not believe it to be his. This process necessarily runs the risk of the will being declared invalid. Also, if the husband died before making a will or changing an existing will, the child might take as a subsequently born child under the Arkansas statutes.<sup>63</sup> The child might even claim as a pretermitted child if the husband made a will after the birth, but failed to mention him out of ignorance or perhaps because he thought the basis for his divorce took care of the problem.<sup>64</sup> The dispute might in either of these events then transpire between the heirs or devisees and legatees and the child-claimant. With blood tests not always effective to establish the absence of parentage by the deceased in such a situation, it might prove difficult to overcome the presumption. This provision as to the presumption, incidentally, appeared in the Third Working Draft to the Uniform Probate Code.<sup>65</sup> This provision has been omitted in the most recent draft of the proposed Code.<sup>66</sup>

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illegitimate under *Martin v. Martin*, 212 Ark. 204, 205 S.W.2d 189 (1947), and it apparently remains the rule under the new provision that the parents must not only have lived together as man and wife but must also have participated in a marriage ceremony in apparent compliance with the law.

61. See 9 C. WIGMORE, EVIDENCE § 2527 (3d ed. 1940).

62. See *West v. King*, 222 Ark. 809, 262 S.W.2d 897 (1953).

63. ARK. STAT. ANN. § 61-102 (1947).

64. See ARK. STAT. ANN. § 60-507 (Supp. 1967).

65. UNIFORM PROBATE CODE, Third Working Draft, § 2-111 (Nov. 1967).

66. UNIFORM PROBATE CODE, Fifth Working Draft (1969).

Another provision taken by the Arkansas drafters from the Third Working Draft of the Uniform Probate Code is found in subparagraph (c) relating to artificial insemination. Under this provision a child resulting from artificial insemination performed with the consent of the husband is treated as the child of both spouses, and "consent of the husband is presumed unless the contrary is shown by clear and convincing evidence."<sup>67</sup> This provision has the advantage of settling for purposes of intestate succession the question of the legitimacy of artificially conceived children, a subject which has provoked quite a number of law review articles.<sup>68</sup> It is desirable to deal with the problem, although it probably would have been better to provide that consent of the husband should be evidenced by a writing to that effect, or simply omit the presumption and provide that the progeny is the child of both spouses if conceived with the consent of the husband. To the contrary, it may be argued that the burden should be placed on the husband to demonstrate a denial of consent, since he might have done something about it while the child had no choice in the matter. Be that as it may, the statute provides the answer in Arkansas as to intestate succession and answers the argument of one student writer that at present "such a child would probably be held illegitimate" in Arkansas<sup>69</sup> (although he then proceeds to argue to the contrary).<sup>70</sup> Also, it places Arkansas in the company of Oklahoma as being the only states to deal legislatively with the problem.<sup>71</sup> Since the

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67. No. 303, [1969] Ark. Acts § 11(c).

68. In Arkansas, see Note, *Artificial Insemination*, 23 ARK. L. REV. 81 (1969). See also, e.g., Hager, *Artificial Insemination—Some Considerations for Effective Counseling*, 39 N.C. L. REV. 217 (1961); Koerner, *Medicolegal Considerations in Artificial Insemination*, 8 LA. L. REV. 484 (1948); Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects in Human Artificial Insemination*, 36 CHI.-KENT L. REV. 1 (1959); Petz, *Artificial Insemination—Legal Aspects*, 34 U. DET. L.J. 404 (1957); Smith, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127 (1968); Weinberger, *A Partial Solution to Legitimacy Problems Arising from the Use of Artificial Insemination*, 35 IND. L.J. 143 (1960); Note, *Artificial Insemination*, 34 IOWA L. REV. 658 (1949); Note, *Artificial Insemination*, 33 MINN. L. REV. 145 (1949).

69. Note, *supra* note 68, 23 ARK. L. REV. at 93.

70. *Id.* at 94.

71. *Id.* at 93, citing 10 OKLA. STAT. ANN. §§ 551-553 (Supp. 1967). The Oklahoma provisions go beyond the problem of intestate succession and legitimacy. They regulate the procedure with regard to consent and limit performance of the insemination to licensed physicians. The written consent of both the husband and the wife is required, and it must be acknowledged by both of them, the physician, and the judge having jurisdiction over adoption; and the written consent must be filed under the same rules as govern adoption papers. Obviously, this

process of artificial insemination seems to be increasing in the frequency of use,<sup>72</sup> and the legal situation is cloudy, the adoption of the provision places Arkansas somewhat in the forefront in dealing with the legal difficulties presented. In connection with the Arkansas provisions, however, and despite the presumption, any lawyer advising clients on the subject would be well-advised to obtain the written consent of the husband to the procedure immediately prior to its being performed in order to reduce the possibility of any subsequent lawsuit on the subject. The memory of the husband of his verbal consent might dim as the wife began visibly to carry the child of the unknown donor. It may not present the opprobrium of an adulterous episode, but it obviously raises altogether different psychological problems than adoption.<sup>73</sup>

Subparagraph (b) of section eleven is almost identically the second paragraph in section 61-103 of the current Arkansas Statutes.<sup>74</sup> It was not in the committee's final draft, but was included by the legislature.<sup>75</sup> Undoubtedly, the question of recog-

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tends to limit the type of litigation which the Arkansas provisions could lead to.

72. Note, *supra* note 68, 23 ARK. L. REV. at 81.

73. See *id.* at 83-85. Not only may the husband bear resentment, but his church may regard the child as illegitimate depending upon the circumstances and the particular church involved.

74. It provides that if the father later marries the mother of his illegitimate child and recognizes the child to be his, it will be deemed legitimate.

75. In adding this subparagraph, the legislature also rewrote subparagraph (a) of the committee's draft in order to avoid any conflict. As enacted, subparagraph (a) provides (as earlier discussed) for a situation in which the parents live together as man and wife and *before* the birth have participated in a marriage ceremony in apparent compliance with the law of the jurisdiction where it is performed. As written by the committee, subparagraph (a) provided that if the parents "shall have lived together as man and wife and have participated in a marriage ceremony in apparent compliance with law *before or after* the birth" then the child would be legitimate even though the marriage was not. This seemingly did away with the requirement of recognition of the child by the father as his own, although obviously it would have to be established that the male partner to the marriage was the father of the child where the marriage took place after the birth. This is implicit in the use of the word "parents" in referring to those who lived together and participated in the marriage ceremony. Consequently, the changes made by the legislature would not seem to be of great significance. However, theoretically at least, the committee might be said to have been lessening some of the rigidity which has come into the cases, since as things now stand, there must be the elements of (1) marriage; (2) recognition by words, acts or conduct; and (3) actual parentage on the part of the alleged father. See *Johnson v. Sanford*, 239 Ark. 362, 389 S.W.2d 421 (1965); *Edgar v. Dickens*, 230 Ark. 7, 320

dition of the parentage of children is a breeder of litigation. But quite obviously, the legislature found this provision to be of worthwhile social value and one in which they felt the gain outweighed the loss. Of equal obviousness is the fact that the provision involves an artificial, statutory legitimation of bastards for inheritance purposes, and this is desirable if the new spouse was also the father.

The provision on the right of inheritance of posthumous descendants of the intestate, conceived before his death and born afterwards, remains essentially the same as before.<sup>76</sup> It still applies only to lineal descendants and not to collaterals, although the reason for not applying it to collaterals seems uncertain in light of the fact that it takes, in most instances, longer than the gestation period to probate an estate from the decedent's death to the point of distribution and closing.

### G. Aliens

Under the prior statutes listed under descent and distribution, the alienage of an ancestor was no bar to title by descent, the personalty of an intestate alien resident was distributed as if he were a citizen, and an alien spouse could take the regular distributive shares.<sup>77</sup> Section thirteen of the Act is a substan-

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S.W.2d 761 (1959); and *Parker v. Hadley*, 227 Ark. 161, 296 S.W.2d 391 (1956). Under the committee's draft, there would only have had to be the elements of marriage and parentage. The courts would likely have continued to give substantial significance to acts of recognition in determining parentage, however, and so it is more of a matter of degree than anything else. It is the author's view that the "recognition" requirement is probably unfortunate, all things considered, although it is not of great moment, and if it kept the legislature happy with the balance of the Act, then it is clearly *de minimis*.

76. See ARK. STAT. ANN. § 61-102 (1947). This is section twelve of the Act.

77. See ARK. STAT. ANN. §§ 61-105 and 61-106 (1947). See also ARK. STAT. ANN. § 50-301 (1947), stating that "upon the decease of any alien having title by purchase or descent, according to this act, to any lands or tenements, such lands and tenements shall descend and pass as if such alien were a citizen of the United States; and it shall be no objection to the husband, widow or kindred of such alien, or any citizen deceased, taking lands and tenements by virtue of the laws of this State regulating the distribution of estates of intestates, that they are aliens." These provisions remain unrepealed, as does ARK. STAT. ANN. § 61-231 (1947), which gives the surviving spouse of an alien dower (or curtesy presumably) in the estate of the deceased spouse, the same as if the alien were a native-born citizen. Also note that Article 2, section 20, of the Arkansas Constitution of 1874 provides that no distinction shall ever be made by law between resident aliens and citizens in regard to the possession, enjoyment or descent of property.

tial improvement over these statutes in that it provides quite clearly that any alien may transmit or inherit property the same as a citizen and subject to the same laws. In short, it eliminates any distinction in intestate succession, either on the receiving or transmitting end based on the fact that the person involved is not an American citizen.<sup>78</sup> No compelling reasons occur as to why this should not be the case. The Fifth Working Draft of the Uniform Probate Code, in similarly providing, states that the purpose "is to eliminate the ancient rule that an alien cannot acquire or transmit land by descent, a rule based on the feudal notions of the obligations of the tenant to the king."<sup>79</sup> Although the rule did not exist as to personal property, both the Arkansas and UPC provisions follow the premise that no distinction should be made as to the nature of the property, or as the Code comment states, "that distinctions between real and personal property should be abolished."<sup>80</sup>

#### H. Degrees of Consanguinity

The committee stated: "It is felt that any code of inheritance should set out the method by which degrees of consanguinity are computed."<sup>81</sup> With this in mind, it proceeded to provide by statute the method which Arkansas has always followed, which is the canon law rule that the common law adopted.<sup>82</sup> Not all states follow this method. Many follow the civil law method,<sup>83</sup> which differs somewhat. It is a matter of choice,

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78. This seems clearly in keeping with the provision of the Arkansas Constitution described in note 77, *supra*.

79. UNIFORM PROBATE CODE, Fifth Working Draft, comment to § 2-113 (1969).

80. *Id.* In *Zschernig v. Miller*, 389 U.S. 429 (1968), the United States Supreme Court held unconstitutional an Oregon statute which provided for escheat if a nonresident alien could not meet the requirements of (1) existence of a reciprocal right of an American citizen to take property on the same terms as a citizen or inhabitant of the foreign country, (2) the right of American citizens to receive payment here of funds from estates in the foreign country, and (3) the right of the foreign heirs to receive the proceeds of Oregon estates without confiscation by the foreign government. This case is noted in the commissioners' comment. The statute (which conflicted with a treaty) was considered an intrusion into the field of foreign affairs, which is exclusively a federal matter.

81. Committee comment to Section 14 of the Act.

82. See *Meek, Descent and Distribution*, ARKANSAS DESK BOOK 13 (1961). See also *Locke v. Cook*, 245 Ark. 777, 434 S.W.2d 598 (1968), and *Kelly v. Neely*, 12 Ark. 657 (1852).

83. Under the "civil law" method, the next of kin were determined by degrees. Each generation between the decedent and the claimant, by counting through the common ancestor, amounted to a degree. See

and the committee's choice and the author's choice is the common law rule now incorporated into statutory law. Under this rule, you start with the common ancestor of any two kinsmen and count downwards. They are related in the degree in which they are distant from the common ancestor. As the statute spells out, by way of illustration, X and his nephew are related in the second degree because the nephew is two degrees removed from the common ancestor, the grandparent. The *Arkansas Desk Book's* discussion by Harry Meek of descent and distribution begins with a table of consanguinity which allows rapid computation of degrees of relationship.

### I. Adopted Children

In comparison with the simple provisions of the Fifth Working Draft of the Uniform Probate Code on adopted children, the Arkansas provisions seem complicated and unduly wordy. The UPC's most recent draft provides that an adopted child for inheritance purposes "is the child of an adopting parent and not of the natural parents except that adoption . . . by the spouse of a natural parent shall have no effect on the relationship between the child and that natural parent."<sup>84</sup> Or, in short, an adopted child is the same as a natural child.

If the Arkansas provisions are wordy, it must be said in partial defense that the work of the committee was not eased by such decisions as *Hawkins v. Hawkins*.<sup>85</sup> To the extent that it dealt with multiple adoptions, this case was overruled by subparagraph (c) of section seventeen providing that a child adopted more than once would be treated as the child of the parents who most recently adopted him and not the prior adoptive parents.<sup>86</sup>

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J. RICHIE, N. ALFORD & R. EFFLAND, *DECEDENTS ESTATES AND TRUSTS* 13, fn. 23 (3d ed. 1967). Most American jurisdictions have employed the civil law method. *Id.* at 47. See, e.g., *Thomas v. Marriott*, 154 Md. 107, 140 Atl. 91 (1928); *Draper v. Draper*, 174 Tenn. 394, 126 S.W.2d 307 (1939).

84. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-109(1) (1969).

85. 218 Ark. 423, 236 S.W.2d 733 (1951), which held that an adopted son was the heir of his first adoptive father even though he had subsequently been adopted by others before his first adoptive father died.

86. This provision was based on the UNIFORM PROBATE CODE, Third Working Draft, § 2-109(b) (Nov. 1967). The "exception" in the Fifth Draft of the UPC (that this provision has no effect on the relationship between the child and a natural parent who is the spouse of the adopting parent) should be taken care of by subparagraph (d) of section seventeen of the Arkansas Act which permits the adopted child to inherit from his natural parents and their kindred.

The extensive committee comment prepared by Mr. Meek noted that the new Arkansas provisions were "intended to establish beyond doubt that an adopted child may inherit from the kindred of the adoptive parents." Under the existing law, he could inherit from his adoptive parents (and also from his natural parents).<sup>87</sup> Moreover, the adoptive parents and "their heirs and next of kin" could inherit from the adopted child or from descendants of the adopted child, except for ancestral property which the adopted child acquired from his natural parents.<sup>88</sup> But the authorities on inheritance by the adopted child from ascendants or collaterals of the adoptive parents had been somewhat conflicting.<sup>89</sup> The committee's provision represents the better and more modern approach, *i.e.*, to remove completely any distinctions involving the adopted child with respect to the adopting parents and their kindred and to make him, in the eyes of the law, the same as a natural child. (In that regard it might be urged that such a philosophy should cut the adopted child off entirely from its natural parents and their kindred for inheritance as well as other purposes; however, the blood relationship apparently provides the rationale for continuance of the present rule in subparagraph (d).) In any event, the modern concept of the place of the adopted child is expressed in subsection (a) of section seventeen in which it is stated that the adopted child and his descendants will inherit "from his adoptive parents and from the lineal ascendants, lineal descendants and collateral kindred of such adoptive parents, to the same extent and with the same rights as if he were the natural child of such adoptive parents" and further that "the natural child of such adoptive parents shall enjoy no priorities or preferences over adopted children." In view of the abolition of ancestral estates it was unnecessary for the statute to say so, but it stated nonetheless that where the property of an intestate adoptive parent had

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87. ARK. STAT. ANN. § 56-109(c) and (d) (1947).

88. *Id.* at (b).

89. See 15 ARK. L. REV. 194, 199 (1961): "Although there have been no decisions in Arkansas developing the issue of the right of an adopted child to inherit from persons other than both his adopted and natural parents under the laws of descent and distribution or by will, it has been held that adopted children of a pre-deceased legatee were within the statute preventing lapse of legacy where the legatee leaves 'a child or other descendant' [sic] surviving the testator, and are entitled to the legacy. [Citing *Dean v. Smith*, 195 Ark. 614, 113 S.W.2d 485 (1938), decided under a statute prior to the present Code provision which includes adopted children of the deceased testator.] To date, the outer limit of Arkansas statutory interpretation seems to include adopted children under the term 'children' but neither 'heirs' nor 'bodily heirs'."

come to him by gift, descent or devise from one of the intestate's parents or a blood relative, "the adopted child (or his descendants) shall not be excluded from inheritance . . . on the ground that he lacks the blood" of the parent or relative from whom it came.<sup>90</sup> Subsection (b) permits the adoptive parents and their kindred to inherit from the adopted child (or his descendants) the same as if the child were natural born.<sup>91</sup>

Although the adopted child may inherit from the natural parents and their collateral and lineal kindred, as previously mentioned, they cannot inherit from him except in situations in which the natural parent marries or remarries and the child is adopted by the step-parent.<sup>92</sup> This again essentially continues the existing law.

Subsection (f), stating that an adopted child will take as a pretermitted child if not mentioned by name or by reference to a class in the will of an adoptive parent, is probably unnecessary in the light of the expression and intent of subsections (a) and (b) eliminating the distinction between natural and adopted children.<sup>93</sup> The clear import of the earlier provisions would be that a testamentary reference to children as a class would necessarily include the adopted child. This subsection must be ascribed to the concern of the committee (which permeates the entire Act) to leave no doubt as to the result in a particular situation and thereby minimize judicial error and interpretive confusion. The same is true of subsection (g), which provides that the new provisions are not intended to alter the Arkansas anti-lapse provisions as applied to adopted children.<sup>94</sup>

Subsection (h) of section seventeen is a new provision which was included to deal with situations involving conflict of laws. In *Shaver v. Nash*,<sup>95</sup> the Arkansas court refused to recognize for inheritance purposes the validity of a non-judicial Texas adoption which was valid under the Texas statutes. Our new Act

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90. This is contrary to the provisions of ARK. STAT. ANN. § 56-109 (b) (1947). This statute has been repealed in its entirety by the new Act.

91. This is the same as under the old statute.

92. No. 303, [1969] Ark. Acts § 17(e).

93. However, this provision is in line with such Arkansas cases as *Graham v. Hill*, 226 Ark. 258, 289 S.W.2d 186 (1956); *Dean v. Smith*, 195 Ark. 614, 113 S.W.2d 485 (1938); *Grimes v. Jones*, 193 Ark. 858, 103 S.W.2d 359 (1937); and *James v. Helmich*, 186 Ark. 1053, 57 S.W.2d 829 (1933).

94. For the Arkansas anti-lapse statute, see ARK. STAT. ANN. § 60-410 (Supp. 1967).

95. 181 Ark. 1112, 29 S.W.2d 298 (1930).

provides that where the child was adopted elsewhere, the adoption will be recognized in Arkansas and the Arkansas rules of intestate succession applied "if the adoption was effected in a court of competent jurisdiction through judicial proceedings which effectually separated the child from his natural parents and inducted the child into the family of the adopting parents."<sup>96</sup> It should be observed that this does not remedy the problem of the ineffectiveness in Arkansas in inheritance situations of the statutorily legal, but non-judicial, Texas adoption. It would have been better to reverse *Shaver v. Nash* by providing that any adoption which is legal under the laws of the jurisdiction in which it is consummated will be binding in determining heirship in Arkansas.<sup>97</sup> Although it may be pointed out that Arkansas does not recognize common law marriages or nuncupative wills (which are valid in some states), the reason would seem to be far more compelling than the failure to recognize foreign adoptions.

The statute also follows the rule that the devolution of Arkansas realty (and Arkansas personalty if the intestate was domiciled in Arkansas at the time of his death) is controlled by Arkansas law.<sup>98</sup>

### J. *The Removal of Some Feudal Appendages*

The battle of printer's ink has been waged over whether the Doctrine of Worthier Title<sup>99</sup> even existed in Arkansas. Some

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96. No. 303, [1969] Ark. Acts § 17(h).

97. R. LEFLAR, AMERICAN CONFLICTS LAW § 242 (1968) states: "The second state, having recognized the validity of the adoptive status, is completely free to apply its own law as it pleases to incidental rights and duties asserted under the status." Thus, Arkansas may apparently do as it pleases, although it would seem that the better rule in this instance would be to accept the foreign adoption for all purposes including the devolution and distribution of property.

98. See LEFLAR, *supra* note 97.

99. The doctrine has two branches, the wills branch and the inter vivos branch. The Restatement indicates that the wills branch is no longer a part of American law. RESTATEMENT, PROPERTY § 314, comment j (1940). Presumably, this branch is non-existent insofar as Arkansas law is concerned. See Comment, *supra* note 10, at 396-404, in which it is concluded that this branch of the doctrine was probably rejected in *West v. Williams*, 15 Ark. 682 (1855). However, two leading texts cite *West v. Williams* for the argument that Arkansas approved the wills branch: W. PAGE, WILLS § 214 (3d ed. 1941), and G. THOMPSON, WILLS § 74 (2d ed. 1936). It has been contended that Page and Thompson were probably in error. Wright, *supra* note 11, at 259-260, fn. 54. Under the wills branch, if the will gave a freehold to an heir of the testator which was of the same quality and quantity that the

felt that it did;<sup>100</sup> some argued that it did not;<sup>101</sup> and some inferred that it was impossible to tell whether the Arkansas court recognized situations in which it might apply.<sup>102</sup> In any event, the committee and the legislature put an end to the great debate over the worthier title trivia. Lifting the language from the Uniform Property Act, the committee in sections twenty-one and twenty-two abolished the doctrine. Section twenty-one provided that in a "testamentary conveyance" the "conveyees" (devisees) take by purchase and not by descent, and section twenty-two provided the same with respect to conveyances *inter vivos*.<sup>103</sup>

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latter would have taken by descent (if the testator had died intestate), the estate would pass by descent rather than by devise.

The *inter vivos* branch of the rule is to the effect that if a landowner grants a life estate to A, with a remainder in the grantor's heirs, the remainder is ineffective and the grantor is left having a reversion. This branch of the rule has some significance in that the grantor could transfer his reversion to someone else by a devise or a conveyance. Also, creditors could levy on it, and the reversion is a taxable part of the estate. See Wright, *supra* note 11, at 260. This branch of the rule is still viable in some states, but has been softened in some jurisdictions into a rule of construction rather than a rule of law. See Braswell v. Braswell, 195 Va. 971, 81 S.E.2d 560 (1954).

100. See 3 R. POWELL, REAL PROPERTY § 375, at 264 (1967); 1 AMERICAN LAW OF PROPERTY § 4.19, at 441 (1952); 3 SIMES & SMITH, *supra* note 10, § 1605 (2d ed. 1956); Fetters, *supra* note 10, 21 ARK. L. REV. at 147.

101. Comment, *supra* note 10, at 409-410.

102. Wright, *supra* note 11, at 262-263. The argument swirled around two cases for the most part: *Fletcher v. Ferrill*, 216 Ark. 583, 227 S.W.2d 449 (1950) and *Wilson v. Pharris*, 203 Ark. 614, 158 S.W.2d 274 (1941). It was concluded: "*Fletcher v. Ferrill* serves to render some doubt as to whether the *inter vivos* branch of the doctrine is a rule of property in Arkansas. Offsetting it, however, is the unfortunate quotation utilized in *Wilson v. Pharris* (from E. WASHBURN, REAL PROPERTY 395 (1887).) The sum total of the situation is that, as is quite often the case in the law of future interests in Arkansas, the situation on the subject of worthier title is confused." Wright, *supra* note 11, at 263.

103. The committee's comment states that it is intended that these provisions abolish (or put to rest any doubt as to the abolition of) both branches of the rule in Arkansas. Thus, a will devising property to "heirs or next of kin" would result in the property passing by devise. Further, a conveyance *inter vivos* to "heirs or next of kin" of the grantor, "which conveyance creates one or more prior interests in favor of a person or persons in existence," results in the heirs or next of kin taking by purchase.

The language of section twenty-one, which pertains to the wills branch, is a bit odd in referring to a "testamentary conveyance" and the "conveyor" and "conveyees." However, it is clearly intended to take care of testamentary dispositions, and there is no question that the court would construe it as doing away with the wills branch, particularly in view of the fact that the wills branch probably was non-existent in

Section fifteen permits kinsmen of the half blood to inherit equally with kinsmen of the whole blood, and somewhat similarly, the doctrine of the first purchaser was abolished in section sixteen of the Act. Under the common law first purchaser rule, as stated in the statute, the intestate's property "would descend only to such of his heirs as were of the blood of the next preceding ancestor in the line of successive descents who acquired title by 'purchase' " rather than by descent. Although many doubtless thought that this ancient doctrine had long since been laid to rest in Arkansas,<sup>104</sup> the Arkansas Supreme Court resurrected it in *Cupp v. Frazier's Heirs*.<sup>105</sup> While the abolition of ancestral estates in the new Act would seem to be sufficient to do away with the first purchaser doctrine, the committee wished to leave no doubt about it.<sup>106</sup> Consequently, the committee again wisely decided to "spell it out" that the doctrine of the first purchaser had at last been accorded a long-awaited and richly deserved grave.

#### K. *Advancements and Debts*

The committee again turned to the Third Working Draft of the Uniform Probate Code for provisions on advancements and debts.<sup>107</sup> Under these provisions, as the comment of the Commissioners' UPC Committee notes,<sup>108</sup> the common law relating to advancements is changed by the requirement of written evidence of the intent that an inter vivos gift be an advancement.

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Arkansas even before the statute. See note 99, *supra*. Section twenty-two, dealing with the inter vivos branch, is a good statement which leaves little to interpretation and was the key provision anyway, since the real question dealt with the inter vivos branch. Section 14 of the Uniform Property Act (incorporated here) has previously been adopted by at least five states, thereby abolishing the rule in those states. See Wright, *supra* note 11, at 264.

104. In Meek, *supra* note 58, 11, it was stated that the first purchaser doctrine "has affected the Arkansas law to an uncertain extent" and that it would be "difficult . . . to give an affirmative opinion" on the state of the Arkansas law as to that rule.

105. 239 Ark. 77, 387 S.W.2d 328 (1965). See Comment, *supra* note 10, at 399.

106. The committee comment stated: "Since this Act is designed to do away with ancestral estates, it may be that the first purchaser rule is automatically abolished; but the committee felt that it might be prudent to place in the Act a section forever renouncing this old medieval rule." Committee comment to No. 303, [1969] Ark. Acts § 16.

107. The section on advancements was a reproduction of the UNIFORM PROBATE CODE, Third Working Draft, § 2-113 (Nov. 1967), and the section on debts reproduced § 2-114 of the same.

108. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-111, committee comment at 31 (1969).

The prior Arkansas provision<sup>109</sup> had simply provided for advancements to be computed in determining the child's share. Under these new provisions, therefore, there is no advancement unless it is declared or acknowledged in writing to be such. Except for writings in which the intent is not clearly expressed, this should serve to minimize litigation over whether the gift is an advancement or not. It eliminates the necessity in Arkansas of determining whether the parent actually intended the transfer to be an advancement.<sup>110</sup>

For purposes of evaluating the advancement, the basis is the value as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever occurs first. If the recipient of the gift does not survive the intestate, the property is not included in computing the share of the recipient's descendants. This latter provision may seem to provide something of an incongruity, particularly if the descendants are to take *per stirpes* from an intestate. If the advancement would have counted against that share had the recipient of the gift lived, and if it were clearly an advancement to him (having been stated in writing to be such), then why should it not count against the same share which his descendants will take by representation? One reasonable answer would seem to be that the advancement received by the deceased heir might not go at his death to his descendants. He might leave it to Fifi LaTour, the go-go dancer at the Flesh Pot Follies. Therefore, his descendants, having not profited by the advancement, should not be deprived by its disappearance. Also, it might be dissipated in other ways during the lifetime of the recipient so that his descendants would never profit. Moreover, the statute refers to advancements to "an heir," and the recipient of an advancement cannot be an "heir" unless he survives the intestate. The Commissioners noted this fact in a comment in both the Third Working Draft and the most recent (Fifth Working) Draft:

The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of the decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most *inter vivos* transfers today are

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109. ARK. STAT. ANN. § 61-116 (1947).

110. Cf. *Shaver v. Johnson*, 233 Ark. 165, 343 S.W.2d 105 (1961), which illustrates the proof requirements under the old rule. The court had to take evidence to determine whether an advancement was involved (and in that case it was found that the evidence established that a conveyance to a son was an advancement of his share of the "home place"). See also, *Holland v. Bonner*, 142 Ark. 214, 218 S.W. 665, 26 A.L.R. 1101 (1920).

intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent dies intestate and not when he leaves a will.

Nonetheless, a contrary argument may be presented in connection with the advancement not counting against the heirs of a donee when it would have counted against the donee himself had he survived the intestate. The whole idea of taking *per stirpes*, or by stocks, or by representation (however it may be expressed), is that the share of the ancestor is taken by his descendants by way of substitution. He is no longer there; so they take what he would have received. If he would have received less or perhaps nothing due to an advancement, then why should they receive anything? Recognizing this argument, the Commissioners made a slight change in the wording of the Fifth Working Draft which causes it to differ from the third Working Draft (on which the Arkansas provision is based). The Fifth Working Draft states that if the recipient fails to survive the decedent, the property shall not be taken into account in computing the share of the descendants "*unless the declaration or acknowledgment provides otherwise.*"<sup>111</sup> This leaves the way open to the intestate donor to declare a gift to be an advancement in writing and make it an advancement not only to the donee but also as against his descendants. An amendment to the Arkansas provision along this line is probably desirable.

The new provision on debts is also taken from the Third Working Draft of the UPC and provides that debts owed to the decedent shall not be charged against the intestate share of anyone except the debtor, and thus, as in the case of advancements, the debt shall not be considered in computing the share of the debtor's descendants. The only change in this UPC provision between the third and fifth working drafts was to change the last few words to read, "in computing the *intestate* share of the debtor's *issue.*"<sup>112</sup> The addition of the word "intestate" adds nothing, since the preceding sentence had referred to the intestate share, and the substitution of the word, "issue," changes nothing since the UPC defines "issue" as meaning all of a person's lineal descendants, except those who are lineal descendants of a living lineal descendant.<sup>113</sup> It is clear that the Arkansas

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111. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-111 (1969).

112. See *Id.*, § 2-112.

113. *Id.*, § 1-201(q).

(and UPC Third Working Draft) provision did not refer to the lineal descendants of a living lineal. Thus, these minor changes as to the debt provision in the two drafts are insignificant.

## II. ANCESTRAL ESTATES

In 1968 the author wrote with respect to ancestral estates that "this perversion is a clear throwback, at best, to a time when our laws were geared to a plantation society and, at worst, to the feudal period itself. This anomaly should be abandoned."<sup>114</sup> Harry Meek, in his discussion of descent and distribution in the *Arkansas Desk Book*, had noted the confusion and conflicts presented by our ancestral estates and related provisions.<sup>115</sup> The abolition of ancestral estates for purposes of intestate succession, which the new Act accomplishes, should therefore come as one of its most pleasing features.

Section eighteen of the Act provides that for purposes of intestate succession, the distinction between ancestral estates and new acquisitions as to an intestate's real estate is abolished. Further, the same rules of inheritance are to apply as to devolution of both real and personal property in all instances. In commenting on these provisions, Mr. Meek stated for the committee:

The problems arising in Arkansas out of this general classification have resulted in much confusion among laymen and lawyers and have resulted in a vast amount of litigation. It is felt that simplicity and substantial justice will be achieved if the same formula for inheritance is applied to personalty and realty and without regard to whether the heritable property be a new acquisition or ancestral.<sup>116</sup>

The absence of ancestral estates may be a novelty in Arkansas, but it hardly comes as such nationally. Powell's work on real property states that ancestral/new acquisition distinctions prevail on a general scale only in Arkansas, Delaware and Tennessee.<sup>117</sup> My own research in 1968 also found Delaware and Tennessee to be the only jurisdictions other than Arkansas which still recognized ancestral estates.<sup>118</sup> Through an examination of

114. Wright, *supra* note 11, at 268.

115. Meek, *supra* note 58, 14, 16-17. And see *Oliver v. Vance*, 34 Ark. 564, 567 (1879), which referred to "our confused and incongruous law of descents and distribution", and which Mr. Meek cited as an indication that our law of descent and distribution had "obfuscated Arkansas Lawyers for more than one hundred years." Meek, *supra* note 58, at 17.

116. Committee comment to No. 303, [1969] Ark. Acts § 18.

117. 6 POWELL, *supra* note 100, § 1001 at 675 (1969).

118. Wright, *supra* note 11, at 268, fn. 84.

the law summaries in *Martindale-Hubbell*, Mr. Meek commented that the indication seemed "that such classifications are now employed on a general scale only in Arkansas and Kentucky and on a limited scale in Tennessee."<sup>119</sup> Whatever the situation, it was quite clear to the committee that Arkansas stood with a distinct and apparently diminishing small minority of states which still adhered to the bifurcation. As summarized in *American Jurisprudence*, second edition:

The doctrine which prescribes a separate course of descent for ancestral estates is not favored in American law, and this has been said to be true even in jurisdictions in which the doctrine still exists. Where not required by statute, the doctrine has been repudiated, and in several states, statutes which formerly distinguished ancestral property for purposes of descent have been abrogated by later statutes.<sup>120</sup>

So, with some exceptions, ancestral estates in Arkansas vanished unlamented into the past, eliminating one more ancient trap which had served to confuse lawyers and laymen and obscure a determination of land ownership.

One exception, of course, is that as to persons dying intestate before the effective date of the Act (at midnight on December 31, 1969),<sup>121</sup> their property will pass under the old law. Consequently, by the end of the year, ancestral estates may be gone, but not forgotten. Title examiners for quite some years to come will have to be aware of the reason why, in 1969 or before, Aunt Minnie (of the paternal side) wound up with the land while Uncle George (from the maternal side) was left out.

The more important exception, however, was written into the Act at the last minute. A January committee draft had abolished ancestral estates entirely and for all purposes. But the final committee draft of February 1, 1969, which was adopted with relatively few legislative changes, stated that ancestral estates were abolished "[o]nly for the purposes of Intestate succession."<sup>122</sup> The reason was explained in the comment thusly:

This section is not intended to abolish the distinctions between Ancestral and New Acquisition property found in the dower and curtesy statutes. See Sections 61-206 and 61-228. It is not necessarily inconsistent to observe the distinction in connection with dower and curtesy and to disregard it for inheritance purposes.

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119. Committee comment, *supra* note 116.

120. 23 AM. JUR. 2d, *Descent and Distribution* § 75 (1965).

121. No. 303, [1969] Ark. Acts § 26.

122. The committee draft of January 14, 1969, read the same as the provision enacted, except that it was not begun with the words quoted in the text. It simply abolished ancestral estates without exception.

For illustration, where the husband inherits land, or acquires it by gift or devise, his wife contributes nothing toward this acquisition. But as his helpmate, in the performance of her domestic duties, it may be said that the wife does contribute something toward the husband's exertions to acquire wealth during the marriage. Therefore, there may be a good reason for giving the widow a greater dower interest in the husband's new acquisition than in his ancestral realty. The community property laws usually exclude from the community property acquired by the husband through gift, devise or inheritance. 15 Am. Jur. 2d, Page 839. Though not directly in point, see *McGuire v. Benton State Bank*, 232 Ark. 1008, 1012; 342 S.W.2d 77.<sup>123</sup>

It may not be "necessarily inconsistent" for lawyers to observe the ancestral/new acquisition distinction with respect to dower and curtesy and forget about it for inheritance purposes, but it would seem that they would find the distinction both inconvenient and lacking in plausible reason. Moreover, while it may

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123. Committee comment, *supra* note 116. In addition to the comments quoted in the text, Mr. Adrian Williamson of Monticello, a very knowledgeable lawyer who is an expert in the probate field and a member of the American Bar Association's Advisory Committee to the Uniform Probate Code Committee, justified the continued adherence to the ancestral property—new acquisition distinction in regard to dower and curtesy in the following manner: "When the Committee on Probate Law had completed its work in drafting and submitting to the Legislature the proposed bill which became Act 287 of 1967, amending numerous sections of the Probate Code, the Committee determined to proceed to draft proposed bills amending (1) the statutory law which has traditionally been known as the law of descent and distribution, and (2) the statutory law relating to dower and curtesy. I feel sure that . . . the Committee adopted, as a matter of policy, a plan to prepare and submit to the Legislature separate proposed bills to accomplish the two purposes last above indicated, for the same reason that they were not dealt with in the Bill amending existing provisions of the Probate Code, i.e., that if the subjects were combined in one bill, both objectives might be defeated because a sufficient number of legislators might be adamant in their objection to changes made in either that part of the bill or the part relating to dower and curtesy." Mr. Williamson goes on to state that he felt it would have been unwise for the Committee to take any action which would get into dower/curtesy in any way. Letter to the author from Adrian Williamson, of Williamson, Williamson & Ball, Monticello, Arkansas, June 10, 1969. His views on the political aspects are possibly well-taken. My feeling to the contrary relates not necessarily to disagreement on the political considerations, but to the view that the committee was *not dealing* with dower and curtesy in abolishing ancestral estates, but (as the January draft purported) purely with ancestral estates. Thus, the effect on dower and curtesy was simply an *incident* of the abolition of ancestral estates. Also, as the text attempts to indicate, the end result of section nineteen of the Act (with regard to heirship by the wife in the absence of descendants) is to make the dower/curtesy distinction in ancestral estates inapplicable in probably the great majority of situations despite the language of section eighteen.

not be *necessarily* inconsistent, on a "reward" type of theory, to say that the wife contributed toward new acquisitions but did not contribute toward ancestral windfalls, what good purpose is served by preserving the distinction? Certainly, it is contrary both to the majority approach and the modern trend in common law jurisdictions to distinguish at all on this basis. Further, if in the absence of the ancestral rule, property acquired by gift, descent or devise from the paternal side is now to ascend to the parents equally, where is the rationale for favoring the intestate's mother in such a situation while cutting back on the share of the intestate's spouse? In short, either the ancestral distinction has some validity to it based on blood and how the property came, or it does not have validity. Arkansas has now joined the vast majority of American jurisdictions in saying that it does not, but has left behind a rather useless appendage of the past suggesting that maybe it does. It is an oddity that will hopefully be abandoned by an appropriate amendment at a future session of the legislature.

This distinction which applies to the surviving spouse appears even more curious in the light of section nineteen of the Act, subsequently discussed herein at length. The "heritable estate" defined in section seven of the Act includes ancestral property, since it includes (subject to dower, homestead, statutory allowances and the like) every right, title and interest of the intestate not terminated by death. Ancestral property ascended under the Arkansas statute, of course, only when there were no descendants.<sup>124</sup> Under section nineteen of the Act, if there are no descendants, then the entire heritable estate of the intestate passes "to the Intestate's surviving spouse" unless the spouses have been continuously married less than the three preceding years, in which event half of the estate passes to the surviving spouse. Thus, the end effect of preserving the ancestral estates distinction as it relates to dower and curtesy is that where the spouses have been married for less than three years, and there are no descendants, the surviving spouse takes fifty percent of the heritable estate as an heir, but dower or curtesy in the total estate is affected by whether it is ancestral or a new acquisition. The distinction is thus curious and somewhat *de minimis*, serving no demonstrably useful purpose.

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124. ARK. STAT. ANN. § 61-110 (1947).

## III. DEVOLUTION OF ESTATE OF INTESTATE

The most important change in the general law of descent and distribution is that already mentioned, in which the surviving spouse becomes the primary heir if there are no lineal descendants. The provision relating to the initial passage of the property to the "children, or their descendants, in equal parts"<sup>125</sup> has been rewritten to spell out that where a child of the intestate has predeceased him leaving descendants, the *per stirpes/per capita* provisions of the Act are applied.<sup>126</sup> In the absence of descendants the surviving spouse takes the estate unless he or she was married to the intestate for less than three continuous years next preceding the intestate's death.<sup>127</sup> This is an heirship statute, of course, and under it the surviving spouse only takes one-half if the death comes within the three-year period. But the three-year proviso has only limited effect in view of the fact that Arkansas' dower and curtesy statutes remain wholly intact. The result, in the case of a widow married less than the three continuous years, is simply that she takes one-half by heirship and much of the rest of the estate by dower under Arkansas Statute Section 61-206. She would not take it all, of course, since the heritable estate is by definition (in section seven) subject to dower and curtesy, among other things. These things to which it is subject would be first deducted. Thus, if by dower a widow would take one-half of the estate in the absence of descendants, creditors and ancestral property, she would (if married less than the three-year period) still only take one-half of the remainder after these deductions. She might even take less, of course, since her dower is only one-third as against creditors, and if there were ancestral realty involved, she would only take a life estate. It is obvious nonetheless that the three-year provision is not of much aid in preventing what these provisions are usually directed toward—the situation of the old fool marrying the young filly.

Where an intestate leaves no descendants or spouse, the estate passes to the parents of the decedent equally or the sole surviving parent.<sup>128</sup> The old provision that new acquisitions passed to the parents (or parent) for life and then to the collateral kindred of the intestate<sup>129</sup> has been eliminated, as has the conflict

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125. ARK. STAT. ANN. § 61-101 (1947).

126. No. 303, [1969] Ark. Acts § 19(a).

127. *Id.* at § 19(b).

128. *Id.* at § 19(c).

129. ARK. STAT. ANN. § 61-110 (1947).

between this more specific provision and the general descent statute.<sup>130</sup> The parents would also take one-half of the heritable estate (although it will amount to much less than the spouse's share), if the surviving spouse had been continuously married to the deceased intestate for less than three years.<sup>131</sup> The same would be true in the case of those next in line after the parents. After the parents, in order of priority, come the brothers and sisters of the intestate and their descendants.<sup>132</sup> Then come the grandparents, uncles and aunts and their descendants in equal parts.<sup>133</sup> This clarifies the old doubts as to whether the grandparents could inherit even though the general statute of descent listed them equally with the uncles and aunts.<sup>134</sup> Moreover, distinctions between maternal or paternal lines have been expressly eliminated.<sup>135</sup> Finally, the last in line are the great grandparents and great uncles and aunts and their descendants.<sup>136</sup> In all cases the *per capita* and *per stirpes* provisions earlier discussed are followed.

The termination of descent with the great grandparents and great uncles and aunts and their descendants is another major change in that under the existing Arkansas law, the inheritance possibilities were, as the statute said, "without end."<sup>137</sup> As Harry Meek pointed out in the committee comment, it was ridiculous to ask a judge to find that the decedent left no heirs and the property escheated to the state. In truth, the deceased was bound to have a distant cousin, many times removed, somewhere. As Mr. Meek put it: "Blackstone estimated that any person had at least 270 million of kindred in the 15th degree based on the assumption that each couple of ancestors had two children and that each of those children on the average left two more."<sup>138</sup> Thus, what any Arkansas escheat proceeding really meant was that through diligent and reasonable efforts no heirs could be found—not that there actually were none. By limiting the inheritance to no higher than the great grandparents, great uncles and aunts and their descendants, the committee sought to relieve this situation. The result is that what are often called

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130. Meek, *supra* note 58, at 17.

131. No. 303, [1969] Ark. Acts § 19(d).

132. *Id.* at § 19(e).

133. *Id.* at § 19(f).

134. See Meek, *supra* note 58, at 36-37.

135. See ARK. STAT. ANN. § 61-111 (1947), and compare with No. 303, [1969] Ark. Acts § 19(f).

136. No. 303, [1969] Ark. Acts § 19(g).

137. ARK. STAT. ANN. § 61-101 (1947).

138. No. 303, [1969] Ark. Acts § 19, committee comment.

"laughing heirs" have been eliminated in Arkansas, at least to the extent of cutting out the more jovial of that group. In this respect the committee was still somewhat more conservative than the drafters of the Uniform Probate Code who (though the Code has not yet been approved, as of this writing) will apparently terminate inheritance with the grandparents or their issue.<sup>139</sup> This is said to be "in line with modern policy" which "eliminates more remote relative tracing through great-grandparents."<sup>140</sup> The UPC also divides the estate half and half between the paternal and maternal grandparents.<sup>141</sup> In both of these situations, it would seem that the Arkansas provisions are superior to the UPC provisions, and in fact, the UPC provisions appear retrogressive in dividing the estate between the paternal and maternal sides on the level of the grandparents. Uncles and aunts do not share equally with the grandparents under the UPC,<sup>142</sup> however, and in this respect (although it is a minor matter), it would seem that the UPC is correct. An intestate is generally more likely to bear a close relationship with his grandparents than with his uncles and aunts.<sup>143</sup>

In moving the surviving spouse into the number two position as an heir of the intestate, the Arkansas Act is following a national pattern toward making the spouse a primary heir, although the Arkansas response obviously falls short of what is taking place. There seems to have developed a national realization that most people anticipate that their spouses, not their children, will inherit their estates (or the bulk of such estates) if they should die without a will. In fact, it seems readily apparent that the great majority of "simple wills" are drafted to assure that such is the case. The compelling thought for a young man with minor children is that title to property which is not owned as a tenancy by the entirety (or joint tenancy with right of survivorship in those states which do not have tenancies by the

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139. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-103 (1969). (Note: The Uniform Probate Code was approved after this article was written, although the official draft was unavailable as of final proof-reading.)

140. *Id.*, committee comment.

141. *Id.*, § 2-103(4).

142. *Id.* The paternal grandparents, for example, will take under the UPC in preference to their issue if either is living. Only if both are deceased will their issue take.

143. As stated in a previous article: An intestate "would likely choose, in most instances, his brothers and sisters over his grandparents, and almost certainly his grandparents over his aunts and uncles. . . ." Wright, *supra* note 11, at 268.

entirety) will pass in large measure to the children if he dies intestate, and will necessitate the creation of a guardianship in order to sell the property. (The problems inherent in creating too many tenancies by the entirety, in lieu of a will, should also not be overlooked.)<sup>144</sup> Even in the case of older people with grown children, it is often if not usually the desire of the husband that the wife have his property and that what is left when she dies should pass to the children. In all of this, of course, we are speaking of moderate-sized or small estates with either no estate tax problems or only relatively minor ones. Thus, if it is the object of an inheritance statute to provide a statutory will for those who fail to execute one of their own choosing (most of whom will be people of small or moderate holdings), and to make the statute as much as possible like the will which the majority would choose, the clear conclusion is that the first and primary heir should be the surviving spouse.

The Uniform Probate Code has taken this approach. Under the provisions of the Fifth Working Draft, in the absence of surviving issue or a parent of the deceased, the entire net intestate estate passes to the surviving spouse.<sup>145</sup> If there are no surviving issue, but a surviving parent or parents, then the first \$50,000 (which is bracketed to permit states to alter the amount) plus half of the balance of the net estate passes to the surviving spouse.<sup>146</sup> If issue survive, all of whom are issue of the surviving spouse also, the same formula is followed.<sup>147</sup> If issue survive, but one or more are not issue of the surviving spouse, the spouse takes one-half of the net intestate estate.<sup>148</sup> In the cases except the latter (and except, obviously, where the spouse took the entire estate), the surviving spouse's share would be reduced in the case of partial intestacy by any amount devised to the spouse by will.<sup>149</sup>

As mentioned, the initial sum to which the spouse is entitled is bracketed in the UPC's most recent draft, and many states may choose a lesser sum than \$50,000 (which in Arkansas, at least, would give the entire estate to the surviving spouse in most instances). It could be \$10,000 or \$20,000, or some other amount, plus one-half. The major point, however, is that the trend is to

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144. See Warner, *Tenancies by the Entirety—An Estate Planner's Dilemma or A Study of Unintended Result*, 23 ARK. L. REV. 44 (1969).

145. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-102(1) (1969).

146. *Id.* at § 2-102(2).

147. *Id.* at § 2-102(3).

148. *Id.* at § 2-102(4).

149. *Id.* at § 2-102(2) (3).

make the surviving spouse the primary and principal heir.<sup>150</sup>

It should also be noted, without conducting any extensive campaign for it, that the outmoded concepts of dower and curtesy should be abolished.<sup>151</sup> This is not to say that the spouse would then receive nothing upon the death intestate of the other marital partner. The surviving spouse should be made the primary heir to such an extent, either in money or percentage of the net estate or a combination of the two, as is deemed appropriate. This would take the place of dower and curtesy. The same desired results would then be achieved as in the present situation but without these ancient relics of dower, curtesy and their incidents. For those who fear that one spouse would choose to disinherit the other by will or a will substitute, the UPC provides a number of sections dealing with the elective share of the surviving spouse.<sup>152</sup> Under these provisions, the surviving spouse is entitled to elect to take one-third of the "augmented net estate" which includes certain transfers made during marriage.<sup>153</sup> These provisions are rather lengthy, but they seek to correct the problem of deprivation of the surviving spouse of his or her share.

One last point should be mentioned concerning descent under the new Arkansas Act. If there is a surviving spouse of less than three years duration but no other relatives to whom the property of the intestate can pass, the entire estate will pass to the surviving spouse rather than escheat to the state<sup>154</sup>—even if the deceased married the surviving spouse on his deathbed. Moreover, if there are no other relatives and no surviving spouse, the property will pass, according to the Act's rules of descent, to the heirs of the intestate's deceased spouse before it will escheat (except where the marriage was terminated by divorce).<sup>155</sup> (If there were more than one deceased spouse, it goes to the heirs of the last one). Only in the absence of all of the

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150. *Id.*, committee comment to § 2-102: "This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate . . . to the surviving spouse. . . ."

151. Where is the sacredness of dower? Blackstone could not even locate it as a feudal relic of the Normans, and he found it absent in Saxon law. He finally concluded that it possibly was "the relic of a Danish custom." 2 BLACKSTONE, COMMENTARIES § 129-130 (1765).

152. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-201 *et seq.* (1969).

153. *Id.* at §§ 2-201, 2-202.

154. No. 303, [1969] Ark. Acts § 20.

155. *Id.*

foregoing will the property escheat to the state. Even though the committee set a limit to possible heirship, therefore, it obviously did not favor escheat—a sentiment which is probably shared by most lawyers and laymen in the state.

#### IV. A MAJOR DEFECT MARKED FOR CORRECTION

Unfortunately, and certainly unintended by the committee or the chief drafter, a major defect in Arkansas probate law resulted from the passage of the new Act. As previously discussed, section nineteen of the Act provides that where there are no descendants, the entire estate of the intestate deceased passes to the surviving spouse if they have been continuously married for three years or longer next preceding the intestate's demise. If married for a lesser period, the surviving spouse takes one-half of the heritable estate. Assuming the policy of elevating the spouse to a more exalted position on the scale of inheritance is favored, there is nonetheless a problem created by a statute which does not relate directly to intestacy, but to the situation in which the decedent dies testate. In this latter situation, although the surviving spouse would probably take under the will in most instances, an election can of course be made to take against the will.<sup>156</sup> The married woman may elect under any circumstances (assuming she personally takes the necessary steps within the statutory time period allotted) and the male survivor may similarly elect when his spouse dies leaving a will executed before her marriage. Where the surviving spouse does elect to take against the will, the amount received is "such part of the property as he or she would have taken *had the deceased spouse died intestate.*"<sup>157</sup>

Thus, under the new intestacy provisions, if a deceased dies leaving descendants, presumably the result is the same as before—the result of an election to take against the will is to give the surviving spouse the amount he or she would have taken as dower or curtesy. But where the deceased dies without leaving descendants, the result of exercise of the spouse's option to take against the will would seem to give the surviving spouse either all of the estate or one-half of the estate, depending upon the marital contingency. It was, of course, not the intention of the drafters or the legislature to reach this result.

It is therefore desirable for a succeeding legislature to do

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156. ARK. STAT. ANN. § 60-501 (Supp. 1967).

157. *Id.* (Emphasis supplied).

either one of two things: (1) Pass a bill abandoning dower and curtesy, amending the Arkansas statute on the spouse's election and providing for a specific elective share of the surviving spouse (in which event, it would be highly desirable to include within the estate from which the elective share is computed certain *inter vivos* transfers which might have been made in an attempt to deprive the surviving spouse of a fair share);<sup>158</sup> or (2) simply amend the existing Arkansas statute previously cited<sup>159</sup> to provide that upon the election of the spouse to take against the will, the spouse will receive such part of the estate as he or she may take under the Arkansas laws pertaining to dower or curtesy, homestead, allowances to the widow in the probate and administration of estates, and section twenty of Act 303 of 1969.<sup>160</sup>

At the time this article is being written, it is uncertain whether a special session of the General Assembly will be called to meet prior to the effective date of the Act. Hopefully, such a session will take place and the legislature will correct the defect discussed above. Since the work of the committee during the 1969-70 Bar Association year will be devoted in large part to a study of dower and curtesy and suggestions for the replacement of these provisions with a statutory "share of the surviving spouse," it will probably be too early to proceed along the lines

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158. This is the procedure being followed in the UNIFORM PROBATE CODE, Fifth Working Draft 2-202 (1969). In fact: "Today in most states an elective share, supplanting or supplementing dower and curtesy, has evolved." J. RITCHIE, N. ALFORD & R. EFFLAND, *DECEDENTS ESTATES AND TRUSTS* 100 (3rd ed. 1967). Moreover, recent statutes have attempted to prevent the husband from denuding the estate in order to greatly limit the amount his spouse will receive. Thus, New York provides that certain *inter vivos* dispositions will be treated as testamentary dispositions for the purpose of the election by the surviving spouse. See MCKINNEY'S NEW YORK ESTATES, POWERS AND TRUSTS LAW § 5-1.1 (1966).

159. Note 156, *supra*.

160. This would seem to be in line with ARK. STAT. ANN. § 61-218 (1947), which provides that widow will elect whether to take "the land so devised, or the provision so made" in her husband's will "or whether she will be endowed of the lands of her husband," although to the extent it was felt that there was any conflict, the newer provision would seemingly govern. The intent of adding the words, "as dower or curtesy," of course, would be to limit the effect of the widow's election to those amounts provided under the various dower statutes (ARK. STAT. ANN. §§ 61-201 through 61-206 (1947)) and to limit the husband's election to the amount provided as statutory curtesy (ARK. STAT. ANN. § 61-228 (1947)). Homestead, of course, should also be received as in intestacy situations, and the widow should be given her statutory probate allowances (under ARK. STAT. ANN. § 62-2501 (Supp. 1967)). Section twenty of the new inheritance provisions would permit a spouse to take as a "last resort heir."

suggested in the first alternative listed above. It is more likely that a simple amendment will be added to the statute similar to that suggested by the second alternative, which will permit the situation to remain stable until the work of the committee has been completed. Without question, the situation is a serious one, since a surviving spouse (particularly a widow) could destroy the effect of the deceased spouse's will by simply electing to take against it, in situations in which the survivor was not the sole or major beneficiary, unless the Arkansas Supreme Court saw fit to follow an unlikely but feasible statutory construction.<sup>161</sup>

#### V. LOOKING TOWARD THE FUTURE

Taken on balance, the advantages of the new Inheritance Act and the improvements which it effects in the law of intestate succession in Arkansas outweigh such criticisms as have been expressed. In eliminating a number of the old feudal appendages, in doing away with the confusing ancestral estates provisions, in clearing away many of the conflicts which existed in the previous law of descent and distribution, the new provisions render a distinct service to the public and to the legal profession.

If you look down the long road, however, it is obvious that a number of other reforms in the general law of property and

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161. The court could hold, and under the circumstances should hold, that although ARK. STAT. ANN. § 60-501 (Supp. 1967) refers to the share which would have been received "had the deceased died intestate," this provision was adopted at a time when the intestate's share was the amount provided by the dower and curtesy statutes. Moreover, since (a) the committee and the legislature did not repeal or alter the dower and curtesy statutes in any way whatsoever, even taking pains to avoid any effect on these statutes in the case of ancestral estates (which were otherwise repealed), and (b) the change proposed by the committee and adopted by the legislature related only to the law of descent and distribution as opposed to existing statutes on wills, then for these reasons it may be concluded that it was not the intent of the committee or the legislature to disturb the *legal effect of taking against a will* as distinguished from the *legal effect of passing title to property where there was no will*. Thus, even though the word, "intestate," is employed in the statute, it would be contrary to the intent of the legislature or the committee to construe the word *in the context of this particular statute* to refer to a share by inheritance, and it must be construed to refer (as it always has and was intended to refer) to the share the surviving spouse would receive through statutory dower or curtesy. To construe it otherwise would emasculate the law of wills in these circumstances and permit results which would be clearly contrary to public policy. Through this construction, which would constitute a wise use of judicial statesmanship, the court could arrive at the conclusion suggested.

estates in Arkansas will be required to modernize our statutes. We are still possessed of all the oddities of the fee tail in Arkansas, which have been exhaustively explored by various and sundry authors.<sup>162</sup> We still have the Rule in Shelley's Case (except in the fee tail application of it), and it serves no useful purpose.<sup>163</sup> The effect of application of the Rule against Perpetuities in an appropriate situation still frightens lawyers to the point that estate planning is probably even hampered by it. (This is not to say that property should not ultimately vest, but simply that statutory provisions can be devised which relieve the harsh effects of the Rule by causing or producing an early vesting when the Rule is offended.)

In the area of intestacy, the problem of more immediate moment is to tend to dower and curtesy. The modern trend, which the Uniform Probate Code manifests is to eliminate these altogether and to provide for the surviving spouse as a primary and first taker (to some extent or in some amount) under the statute on intestate succession. This is better than the treatment accorded the surviving spouse in the Arkansas Act. In order to prevent a fraud from being practiced on the surviving spouse by the disposition in large measure of the property of the deceased prior to his demise, the UPC and a number of states follow policies which include various inter vivos dispositions of property within the estate on which the surviving spouse's share is based.<sup>164</sup> The result is to prevent the result which some might fear if dower is dispensed with. Problems of this type, as long as they are recognized, can be worked out.

These new inheritance statutes, then, are a first forward step down the road to property reform in Arkansas. It is to be hoped that the Bar Association, through its Committee, will continue its efforts and will finish the work it has begun.

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162. See particularly, Fetters, *The Entailed Estate: Ferment for Reform in Arkansas*, 19 ARK. L. REV. 275 (1966); and see Wright, *supra* note 11, at 254-259.

163. See Wright, *supra* note 11, at 250-254.

164. UNIFORM PROBATE CODE, Fifth Working Draft, § 2-202 (1969):