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THE UNIFORM PROBATE CODE AND OKLAHOMA LAW: A COMPARISON

ORLEY R. LILLY, JR.*

PART IT

INTRODUCTION

It is, of course, ultimately a question for the Legislature to decide whether any part or all of the Uniform Probate Code shall become the law of Oklahoma. A decision on that matter should come only after a thorough study of the Code and a determination that it offers an improvement or improvements over existing law.

It would seem, nonetheless, that such a study should be undertaken. The Oklahoma statutes relating to testamentary matters are of ancient vintage. The titles on wills and succession¹ and on probate procedure² in large part date from statehood and before.³ Moreover, in patterning its legislation on enactments of other states and territories, Oklahoma, as

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† Part II of this article will appear in The Tulsa Law Journal, Vol. 9, No. 1.

¹ OKLA. STAT. tit. 84 (1971).
² OKLA. STAT. tit. 58 (1971).
did California, borrowed heavily from the nineteenth century probate code developed by Professor David Dudley Field.

"Judicial" notice can be taken of social and economic changes as well as of developments in transportation and communication that have taken place since original thinking went into what formed the basis of Oklahoma law. These factors alone would seem sufficient reason to warrant re-examination of this entire area.

It will be recognized that re-examination by the Legislature would be a voluntary public service on its part. There is likely no identifiable citizens group with sufficient interest in probate and succession matters to press for legislative change. Perhaps the only group interested at all is the probate bar itself, and the direction of that interest can only be surmised. Certainly there will not be that groundswell for change that, for example, accompanied adoptions of the Uniform Commercial Code by the many states.

Consideration of the Code and Oklahoma law will be undertaken in the format of the Code.

**ARTICLE I: GENERAL PROVISIONS, DEFINITIONS**

**AND PROBATE JURISDICTION OF COURT**

The Code contains a general fraud section designed to supplement the protections built into the Code and provide a remedy that can be pursued outside the estate settlement process. Although the section presumably would not greatly

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6 Article V of the Code, entitled "Protection of Persons Under Disability and Their Property," and Article VIII, "Effective Date and Repealer," will not be discussed.

6 General definitions of terms, see Uniform Probate Code § 1-201 [hereinafter cited as UPC], will be discussed in conjunction with substantive provisions of the Code to which they relate and where discussion of them will be meaningful.

7 UPC § 1-106.

8 Id., Comment.
add to Oklahoma equity jurisprudence, it has merit. Innocent purchasers for value are protected. Recovery against the wrongdoer is not limited in time, but an action against him must be commenced within two years after discovery of the fraud. Recovery, including restitution, may be had against any person who benefitted from the fraud, innocent or not, but only within five years after its commission.

The rules of evidence of the court of general jurisdiction are adopted by the Code, unless modified by its more specific provisions. The same evidentiary value is accorded a death certificate as under existing Oklahoma law, and this recognition is extended to other governmental documents. A presumption of death arises under the Code after five years' unexplained absence rather than after seven as under Oklahoma law.

Insofar as jury trials are concerned, the Code provides:

If duly demanded, a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

The bracketed phrase indicates that a state legislature may, at its option, eliminate that portion without destroying the

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10 UPC § 1-107.
11 UPC § 1-107 (1).
12 OKLA. STAT. tit. 63, § 1-324 (b) (1971).
13 UPC § 1-107 (2).
14 UPC § 1-107 (3).
15 OKLA. STAT. tit. 58, § 941 (1971).
16 UPC § 1-306 (a).
Code's goal of substantive uniformity. If that portion is omitted, the statute seems unnecessary, since it would then apply only where trial by jury is a constitutional right and could not be denied even in the absence of a statute granting it. Enactment of the bracketed portion would expand the right to jury trial existing under present Oklahoma law. As early as 1908 the Oklahoma Supreme Court held that jury trial was not a matter of right in probate proceedings, but only of advisory use within the discretion of the court. There seems to be no sound reason to expand the right, as the tendency of juries to speculate in wills cases has been criticized.

Persons not formally before the court may be bound under the Code by judicial orders binding others who may represent them. For example, where there is no conflict of interest, an order binding a fiduciary will bind the persons in whose behalf he acts. The doctrine of virtual representation is codified as a means of binding unborn or unascertained persons. In addition, the use of guardians ad litem to bind interests is discretionary with the court. Although similar results may be reached under common law, codification of these rules seems desirable.


18 See, e.g., T. Atkinson, supra note 4, at 35, 139-40, 269, 533-34; Bade, Jury Trial in Will Cases in Minnesota, 22 Minn. L. Rev. 513 (1938). But see Laube, The Right of a Testator to Pauperize His Helpless Dependents, 13 Cornell L.Q. 559, 572-75 (1928).

19 UPC § 1-403 (2).

20 UPC § 1-403 (2) (ii).

21 UPC § 1-403 (2) (iii); see Restatement of Property § 183 (1936). Oklahoma has a similar provision in regard to future interests in realty. Okla. Stat. tit. 12, § 1147.3 (1971).


ARTICLE II: INTESTATE SUCCESSION AND WILLS

Part 1. Intestate Succession

In the general comment introducing intestate succession, the Commissioners state that, among the states, “[t]he most common pattern [of intestate succession] for the immediate family retains the imprint of history . . . .”24 They must have been looking directly at Oklahoma’s intestate succession law.

Although dower and curtesy have been abolished25 and replaced by the statutory forced share,26 Oklahoma law does contain features that should be relegated to history.

The minimum share of an Oklahoma surviving spouse usually is one-third,27 probably a hold-over from dower days, though it may be less.28 The Model Probate Code29 proposed to increase that minimum to one-half. Although it retains that minimum,30 the Uniform Probate Code expands the survivor’s share in most situations. This is done “to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.”31 The premise seems reasonable since most Americans die intestate32 and probably

24 UPC, art. II, pt. 1, General Comment.
25 OKLA. STAT. tit. 84, § 214 (1971).
26 OKLA. STAT. tit. 84, § 44 (1971).
27 OKLA. STAT. tit. 84, § 213, First (1971).
28 See text accompanying notes 42-43 infra.
29 See MODEL PROBATE CODE § 22 (a) (1946). This Code gives the surviving spouse one-half the estate if issue survives the decedent; five thousand dollars plus one-half of the remainder if there is no issue, but parents or their issue survive; and the entire estate in other cases. Id.
30 UPC § 2-102(4). UPC § 2-802 defines “surviving spouse.”
31 UPC, art. II, pt. 1, General Comment.
would want the surviving spouse to take the largest part of their estates.33

Thus, under the Code, the surviving spouse receives the minimum one-half only if the intestate left issue who are not also issue of the spouse.34 If there survives the intestate a parent or issue of him and his spouse, the share of the spouse is fifty thousand dollars plus one-half of the remainder of the estate;35 in all other cases the spouse takes the entire estate.36

The Oklahoma intestate succession statute37 is a horrible example of legislative drafting. It contains nine canons of descent dealing with a variety of possible family trees, and yet all its applications are not clear.38 The share of a surviving Oklahoma spouse is less in all situations than under the Code. If the intestate is survived by a parent, brother or sister, but no issue, the spouse's share is one-half;39 only if his surviving relatives are of more remote degree does the spouse take the entire estate.40 Under the Code, the spouse's share would not be reduced by a brother or sister surviving the intestate.41

If an Oklahoma intestate is survived by more than one child or the issue of more than one child, the spouse's share

33 A survey of wills in small English estates showed that the surviving spouse in ninety-seven per cent of the cases took the whole estate, a life interest in the whole estate, or other substantial interest. See Warren, The Law of Property Act, 1922, 21 Mich. L. Rev. 245, 266 (1923).
34 UPC § 2-102(4). For the Oklahoma treatment, see text accompanying notes 42-43 infra.
35 UPC § 2-102(2), (3). The $50,000 figure is bracketed. See text following note 16 supra.
36 UPC § 2-102(1).
38 See notes 58-60 infra and accompanying text.
41 UPC § 2-102(1). See text accompanying notes 33-35 supra.
of his estate is one-third. But even that share may be reduced if the intestate is survived by issue of a marriage prior to that with his surviving spouse. In such a case, the spouse will be entitled to the appropriate share of all property acquired during coverture with the intestate, but as to that property not so acquired the spouse is entitled to only a child's share.

If an Oklahoma intestate is not survived by a spouse, issue, parent or sibling, the search for the next of kin can be unending; his property escheats to the state only if no kindred of any degree can be found. Under the Code the search for a next of kin ceases with grandparents or their issue; no tracing through great-grandparents is allowed and, if that is required to find the next of kin, the estate instead escheats to the state.

Oklahoma succession law also has some anomalies. Although not a community property state, it utilizes the concept. If the intestate leaves no issue, all property acquired by joint industry of the spouses during coverture goes to the survivor to the exclusion of relatives. If the survivor dies intestate, the joint-industry property remaining in his estate passes equally to the heirs of each spouse, though the survivor may will that property freely or otherwise dispose of

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42 OKLA. STAT. tit. 84, § 213, First (1971).
43 Id. For the Code treatment, see text accompanying note 34 supra.
44 See OKLA. STAT. tit. 84, § 213, Sixth (1971).
45 OKLA. STAT. tit. 84, § 213, Ninth (1971).
46 UPC § 2-103 (4).
47 UPC § 2-105.
49 OKLA. STAT. tit. 84, § 213, Second (1971).
50 Id.
it during his lifetime.\textsuperscript{51} Thus it may be necessary to compute two estates for an Oklahoma decedent.\textsuperscript{52}

The ancestral property doctrine and two of its variations are imbedded in Oklahoma law. Where next of kin of equal collateral degree are entitled to an estate, those who claim "through the nearest ancestors must be preferred to those claiming through an ancestor more remote."\textsuperscript{53} In addition, the surviving parent of a minor intestate who has never married is prevented from sharing in property the minor inherited from the predeceased parent.\textsuperscript{54} Finally, "[k]inred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."\textsuperscript{55} The Uniform Probate Code eliminates the ancestral property doctrine both as to whole-\textsuperscript{56} and half-blood\textsuperscript{57} relatives.

Even though the Oklahoma succession statute is drafted to apply to a dozen or more specific family situations, in at least one instance its application is not clear because of an inadequate definition of "representation." The law provides that "[i]nheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living . . . ."\textsuperscript{58} The first

\textsuperscript{52} Such a computation seems to be required under similar, but not identical language where issue of a prior marriage survives. See note 43 supra and accompanying text.
\textsuperscript{53} OKLA. STAT. tit. 84, § 213, Sixth (1971).
\textsuperscript{54} OKLA. STAT. tit. 84, § 213, Seventh, Eighth (1971).
\textsuperscript{55} OKLA. STAT. tit. 84, § 222 (1971). A whole blood is preferred as administrator over a half-blood also entitled. OKLA. STAT. tit. 58, § 123 (1971).
\textsuperscript{56} See UPC § 2-103.
\textsuperscript{57} UPC § 2-107.
\textsuperscript{58} OKLA. STAT. tit. 84, § 228 (1971).
canon of the succession statute, after providing for the surviving spouse, says, "but if there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation . . . ." Where does representation begin? Does it begin with the intestate’s deceased children, so that all lineals more remote take by representation? Or, do the nearest lineals take per capita, with only those more remote taking by representation? The Supreme Court of Oklahoma has not answered these questions.

The Uniform Probate Code “assures that the first and principal division of the estate will be with reference to a generation which includes one or more living members,” with only those heirs more remote taking by representation from that generation.

Adoption was unknown to the English common law. Since mid-nineteenth century American states have recognized adoption and various succession rights based on the status created. Oklahoma’s most recent legislation is the Uniform Adoption Act, enacted in 1957. A reasonable interpretation of that Act permits the conclusion that, for intestate succession purposes, the adopted child is to be treated as if he were a natural child of his adoptive parents where inheritance from them or through them from ascendant or collateral kin is in issue. The adoptive parents expressly are entitled to inherit from and through the child. The inheritance rights of the

61 See UPC § 2-106, Comment.
62 See T. Atkinson, supra note 4, at § 23.
65 Id.
child’s other ascendant or collateral “adoptive kin” are not specifically spelled out in the Act, though it does state that . . . all the rights, duties and other legal consequences of the natural relation of child and parent shall . . . exist between such adopted child and the adoptive parents adopting such child and the kindred of the adoptive parents.\(^{66}\)

On the other hand, the natural parents, “unless they are the adoptive parents or the spouse of an adoptive parent,” have no intestacy rights in the child’s estate.\(^{67}\) The Act does not, however, specifically deal with the intestacy rights of the other “natural” kin, ascendant or collateral, of the child. Nor does it exclude the child from taking by intestacy from his natural parents, and the Oklahoma Supreme Court would seem inclined to permit him to do so.\(^{68}\)

Under the Uniform Probate Code, intestacy problems relating to an adopted status seem troublesome since it may be necessary to construe as many as seven provisions in the Code to resolve them.\(^{69}\) The solutions to those problems, however, do seem to be uniform. The Code provides:

If . . . a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.\(^{70}\)

\(^{66}\) Id. (emphasis added).
\(^{67}\) Okla. Stat. tit. 10, § 60.16(2) (1971).
\(^{69}\) See UPC §§ 1-201 (3) (“child” defined), 1-201 (21) (“issue” defined), 1-201 (28) (“parent” defined), 2-102 (share of the spouse), 2-103 (share of heirs other than surviving spouse), 2-106 (representation), 2-109 (meaning of child and related terms).
\(^{70}\) UPC § 2-109 (1) (emphasis added).
If the "by, through, or from" language in this provision is given its "fullest effect," it seems reasonable to conclude that all the natural relationships which existed before the adoption are dissolved by it, and that "natural" relationships are created by law for the adoptee as if he had been a "natural" child of his adopting parents. Such an interpretation seems desirable since there can be no "stranger to the adoption" where intestacy is concerned.

Illegitimates are accorded greater rights under the Code than by Oklahoma law. Under the latter, an illegitimate inherits from his mother, and she from him. However, he does not represent his mother in inheritance from her lineals or collaterals unless his natural parents marry and he is acknowledged by or is adopted into the family of his natural father. On the other hand, the heirs of the mother of an illegitimate may inherit from him. The provision of the Code, that an illegitimate is a child of his mother for purposes of succession by, through, or from a person, seems fairer than Oklahoma law. It is difficult to justify allowing the mother's heirs to succeed to an illegitimate's estate but deny him the right to represent her unless she marries his natural father. Furthermore, his mother's relatives could by will deny the illegitimate participation in their estates.

In Oklahoma a witnessed writing acknowledging paternity permits an illegitimate to take by intestacy from his...
father, but representation of his father is allowed the illegitimate only on the same basis as of his mother. Under the Code participation in a marriage ceremony by his natural parents before or after the child's birth legitimizes him for all succession purposes, even though the attempted marriage is void. Furthermore, paternity and full succession rights of an illegitimate can be established by adjudication before or, by clear and convincing proof, after the father's death. Succession rights from an illegitimate for the father and his kindred, however, are not created by adjudication unless the father has openly treated the child as his and has not refused him support.

Advancements are recognized in Oklahoma and by the Code, though there are differences in coverage and detail. Only lineal descendants can be affected by an advancement in Oklahoma; the Code extends advancements to anyone who becomes an intestate's heir, including his spouse and collaterals. Proof of an advancement under the Code is limited to a written declaration of the decedent contemporaneous to the property transfer or to a written acknowledgement of the donee. In addition to proof by these methods, an Oklahoma court could find an advancement "if expressed in the gift" or "if charged in writing by the decedent." The more stringent proof requirements under the Code have the healthy effect of preventing speculation as to the nature of a transaction many years after it took place.

If in an Oklahoma advancement a value is expressly placed on the property so transferred, that value must be

79 OKLA. STAT. tit. 84, § 215 (1971).
80 See note 75 supra and accompanying text.
81 UPC § 2-109 (2) (i).
82 UPC § 2-109 (2) (ii).
83 Id.
84 OKLA. STAT. tit. 84, § 223 (1971).
85 UPC § 2-110; id., Comment.
86 UPC § 2-110.
87 OKLA. STAT. tit. 84, § 225 (1971).
utilized in computing distribution of the intestate's estate, regardless of the fair market value of the property. Valuation of an advancement under the Code is made as of the time the heir came into possession or enjoyment of the property or the death of the person who made the advancement, whichever first occurs. In Oklahoma a person entitled to a portion of an intestate's estate by representation of a parent who received an advancement from the decedent is charged with that advancement in distribution of the estate, such a practice under the Code is not permitted unless the declaration or acknowledgement of the advancement provides otherwise.

Analogous to problems of representation in advancements are those of debts owed the decedent by persons who would have been his heirs. The Code provides that "[a] debt owed to the decedent is not charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue." This is the majority view, and though not compelled by statute appears to be the position that would be taken by Oklahoma courts.

Building on the rationale underlying the Uniform Simultaneous Death Act, the Uniform Probate Code provides that "[a]ny person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession . . . ." If the times of death of either or both and that

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88 OKLA. STAT. tit. 84, § 226 (1971).
89 UPC § 2-110.
90 See OKLA. STAT. tit. 84, §§ 227, 228 (1971).
91 UPC § 2-110.
92 UPC § 2-111.
93 See T. Atkinson, supra note 4, at 790.
95 See OKLA. STAT. tit. 58, §§ 1001-08 (1971).
96 UPC § 2-104.
97 Id.
98 Id.
the intestate was survived by 120 hours cannot be established, failure to have survived is presumed. These provisions are not to be given effect, however, if their application would cause the intestate's estate to escheat to the state. There are no provisions comparable to these Code rules in Oklahoma law.

Part 2. Elective Share of Surviving Spouse

The common law for centuries has protected a surviving spouse from complete disherison; the principal protections were the estates of dower and curtesy.

In abolishing those estates, Oklahoma substituted other protections. The surviving spouse of an intestate is given an outright share of his estate ranging from a minimum child's share to the entire estate, depending on who his heirs are and the nature of the property in the estate. The surviving spouse of a testator is protected by the "forced share" concept: if the testator leaves his surviving spouse less than would be his share by intestacy, the spouse may elect to take the intestate share in opposition to the will.

It is recognized, however, that these protections can be of limited effect since the share provided pertains only to the

99 Oklahoma does provide that

if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed in accordance with the laws of descent and distribution of this State.


102 See Okla. Stat. tit. 84, § 44 (1971). As to the testator's property not acquired by joint industry during coverture, however, the forced share is limited to one-half. See id.
decedent's administered estate. By a concerted effort before death, a spouse may effectively disinherit his surviving spouse through the use of will substitutes such as gifts, inter vivos trusts, joint survivorship transfers, insurance beneficiary designations, and the like.

In order to combat spousal disinheritance of this type, judicial doctrines have been developed to enlarge the administered estate. In *Courts v. Aldridge*\(^{103}\) the Oklahoma Supreme Court found a transfer “illusory” where the grantor did not intend to divest himself of ownership, control and enjoyment of property. It held:

> A resulting trust arises where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from accompanying facts and circumstances, that the beneficial interest is not to go to or be enjoyed with the legal title. In such a case a trust is implied or results in favor of the grantor whom equity deems to be the real owner.\(^{104}\)

In the recently decided case of *Sanditen v. Sanditen*\(^{105}\) the court recognized the existence in Oklahoma of an action in favor of a spouse on allegations that the other spouse fraudulently gave jointly acquired property\(^{106}\) away so that she would not inherit it at his death as provided in the statute on descent and distribution.\(^{107}\) The court thus held:

\(^{103}\) 190 Okla. 29, 120 P.2d 362 (1941).
\(^{105}\) 496 P.2d 365 (Okla. 1972).
\(^{106}\) The Oklahoma court has defined “separate property” as that acquired by gift, devise or descent, or by exchange of a spouse's individual property. “[A]ll property, not falling within the definition of separate property, acquired after marriage by the labor of either spouse, is . . . deemed to be acquired by the labor of both spouses.” *Heirs, Etc., of Payne v. Seay*, 478 P.2d 889, 896 (Okla. 1970).
While we do not agree with plaintiff's argument that a wife has a vested interest in jointly acquired property, we do find, by this opinion, that a married man cannot make gifts of jointly acquired property during his lifetime without the consent or knowledge of his wife where the transfer is in fraud of the wife's marital rights. 108

The court has, nonetheless, adhered to the position that a spouse may in his lifetime deal with his separate property as he sees fit, except in defraud of creditors. 109

As to domiciliaries, 110 the Uniform Probate Code provides that the surviving spouse of a testator or an intestate 111 "has a right of election to take an elective share of one-third of the augmented estate . . . ." 112

The augmented estate is computed as follows: To the net distributable estate 113 are added two categories of property. In the first category are inter vivos transfers other than to the spouse made by the decedent during the marriage which are in the nature of will substitutes in that he continues to have some benefits in or controls over the property transferred. 114 Also included are transfers "made within two years of death . . . to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000." 115

108 496 P.2d at 367.
110 "It is especially important that states limit the applicability of rules protecting spouses so that only estates of domiciliary decedents are involved." UPC, art. II, pt. 2, General Comment; see UPC § 2-201 (b).
111 See UPC § 2-202 (2).
112 UPC § 2-201 (a) (emphasis added).
113 "[T]he estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims . . . ." UPC § 2-202.
114 See UPC § 2-202 (1); UPC § 2-202, Comment.
115 UPC § 2-202 (1) (iv).
In the second category are assets of the surviving spouse derived from the decedent before or after the marriage and those which come to the spouse because of the decedent’s death. This latter group would include the spouse’s beneficial interest in any inter vivos trust created by the decedent; property the decedent appointed to the spouse; insurance proceeds on the decedent’s life, and the commuted value of annuity rights, attributable to premiums paid by him and which vest in the spouse; the commuted value of pension, disability, death benefit, or retirement rights which vest in the spouse because of the decedent’s disability or death; and the value of community property rights the spouse might have in property formerly owned by the decedent. Also included in the second category is property the spouse derived from the decedent and in turn has given away in a will-like transaction.

Property includable in the second category is valued as of the date it irrevocably vested in the spouse or of the decedent’s death, whichever first occurs. Furthermore, the Code creates a rebuttable presumption that all the spouse’s property and that transferred by him was derived from the decedent and places the burden on the spouse to show otherwise.

The augmented estate specifically does not include federal social security benefits, property transfers made with the spouse’s written consent or joinder, and insurance proceeds and the like payable to anyone other than the spouse.

\[116\] See UPC § 2-202(3).
\[117\] "Premiums paid by the decedent’s employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.” UPC § 2-202(3)(i).
\[118\] See UPC § 2-202(3).
\[119\] See id.; id., Comment.
\[120\] UPC § 2-202(3)(ii).
\[121\] UPC § 2-202(3)(iii).
\[122\] UPC § 2-202(3)(i).
\[123\] UPC § 2-202(2).
After items includable in the augmented estate are determined and valued, the spouse’s one-third share is reduced by the value of property in the augmented estate which came to the spouse by testate or intestate succession or other means and which has not been renounced, including second-category property determined to be a part of that estate. If a balance is still due the spouse, contributions from other recipients of portions of the augmented estate can be had to satisfy the one-third share.

The Commissioners state that, “[a]lthough the system described . . . may seem complex, it should not complicate administration of a married person’s estate in any but very unusual cases.” Several features of the system lead them to this conclusion. First, the surviving spouse has the burden of asserting an election, “as well as the burden of proving the matters which must be shown in order to make a suc-

124 See text accompanying notes 116-19 supra.
125 See UPC § 2-207(a).
126 The spouse probably would withdraw his demand unless a balance were due him at this point. See UPC § 2-205(c).
127 See UPC § 2-207(a). Contribution can be had only from original recipients of augmented estate property and their donees, to the extent the donees still have the property or its proceeds, see UPC § 2-207(c), and who were served with notice of the hearing on the election, see UPC § 2-205(b). Contributions are equitably apportioned, see UPC § 2-207(b), but in no case is a contribution greater than it would have been if relief had been sought against all possible contributors, see UPC § 2-205(d). The property or its value may be given up. See UPC § 2-207(c). An order for contribution may be enforced in the courts. See UPC § 2-205(e).
128 UPC, art. II, pt. 2, General Comment (emphasis in original).
129 See UPC § 2-205(a). A petition for election must be filed within six months of publication of notice to decedent’s creditors, though the court may extend that time for cause shown. Id.
cessful claim to more than he or she has received."\textsuperscript{130} A second feature that should reduce the number of cases in which an election will be made is that of requiring the spouse to off-set all his property attributable to the decedent.\textsuperscript{131} Finally, the expanded effectiveness and use of waivers and releases permitted under the Code would allow estate planners to head off election litigation.\textsuperscript{132} Nonetheless, the system does provide realistic protection against disinheritance of the spouse.\textsuperscript{133}

The Code provides:

\begin{quote}
The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure.\textsuperscript{134}
\end{quote}

Such a provision would have the effect of broadening the effectiveness of contractual arrangements over that of current Oklahoma law. Although the Oklahoma Supreme Court has upheld the validity of antenuptial waivers of survivors’ election rights,\textsuperscript{135} it has refused to uphold postnuptial agreements purporting to do the same thing.\textsuperscript{136} The court has in addition held that an antenuptial waiver of the widow’s allowance\textsuperscript{137} is against public policy and void.\textsuperscript{138}

\textsuperscript{130} UPC, art. II, pt. 2, General Comment. See text accompanying note 121 supra.
\textsuperscript{131} See UPC, art. II, pt. 2, General Comment. See notes 110-23 supra and accompanying text.
\textsuperscript{132} See UPC, art. II, pt. 2, General Comment. See notes 134, 139 infra and accompanying text.
\textsuperscript{133} See UPC § 2-202, Comment.
\textsuperscript{134} UPC § 2-204.
\textsuperscript{135} E.g., Talley v. Harris, 199 Okla. 47, 182 P.2d 765 (1947).
\textsuperscript{136} E.g., Crane v. Howard, 206 Okla. 278, 243 P.2d 998 (1951).
\textsuperscript{137} See OKLA. STAT. tit. 58, § 314 (1971).
\textsuperscript{138} In re Rossiter’s Estate, 191 Okla. 342, 129 P.2d 856 (1942).
An agreement to waive "all rights," or equivalent language, under the Code applies to intestate, election, homestead, exempt property, and family allowance rights. Oklahoma law does not seem to go that far. In Pence v. Cole the court had to construe an antenuptial agreement in light of a claim of homestead rights in the surviving spouse. Although homestead rights were not specifically mentioned, the agreement did purport to settle rights of the spouses in each others property, which rights were stated to be "in lieu of . . . rights . . . under the law as widower." The court held that homestead is an individual right, not an interest in a testator's property, and that a devise of the homestead passed subject to the survivor's rights.

While in Oklahoma the surviving spouse takes under succession law unless an election to take under the will is made, the reverse is true under the Code. The latter provides that the spouse's decision to take an elective share does not deprive him of benefits under the will or by intestacy unless those benefits are expressly renounced. Furthermore, the spouse is entitled to exempt property, homestead and family allowances whether or not he chooses the elective share or renounces will benefits, although a testator may state that the will benefits are in lieu of those rights. In Oklahoma, whether the spouse must elect between will benefits or rights

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130 See UPC § 2-204. The same construction applies in the case of "a complete property settlement entered into after or in anticipation of separation or divorce . . . ." See id.
140 85 Okla. 69, 205 P. 172 (1922).
141 Id. at 71, 205 P. at 173.
142 Id. at 76, 205 P. at 178; see OKLA. STAT. tit. 31, § 2; tit. 58, § 311 (1971).
143 1 R. Huff, OKLAHOMA PROBATE LAW AND PRACTICE 347 (1957).
144 See UPC § 2-205 (a).
145 UPC § 2-206 (a). These benefits are charged against the elective share. See UPC §§ 2-201, -202, -207 (a).
146 UPC § 2-206 (b).
conferred by law depends upon the express or implied intention of the testator; if intention cannot be ascertained, will benefits are presumed to be in addition to rights conferred by law.\footnote{147} Under both systems the right of election is personal to the surviving spouse,\footnote{148} although it may be exercised by order of court in the case of an incompetent.\footnote{149}

Part 3. Spouse and Children Unprovided For in Wills

In Oklahoma special provision for a spouse omitted from a will is unnecessary because the forced share and the spouse's intestate share of the decedent's estate are the same.\footnote{150} That probably would never be true under the Code. The Code makes no special provision for a spouse who married the testator prior to the execution of his will; that spouse can only assert his elective share rights. However, the Code does provide that a spouse who married the testator after the execution of his will may receive the share he would have taken under the intestate succession statute.\footnote{151} It is probable that an intestate share would be greater than a one-third share in the augmented estate.\footnote{152} The right to the intestate share is not absolute however, but may be taken

\[\ldots\text{unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.}\footnote{153}

If the quoted conditions are met, the omitted spouse could

149 See UPC § 2-203; Turner v. First Nat'l Bank & Trust Co., 262 P.2d 897 (Okla. 1953).
150 See OKLA. STAT. tit. 84, §§ 44, 213 (1971).
151 See UPC § 2-301.
152 See UPC §§ 2-102, -201 (a), -202.
153 UPC § 2-301.
still assert his right to an elective share. Overall, however, the provision for an omitted spouse should tend to reduce the number of cases in which an election will be made.\footnote{154}{See UFC § 2-301, Comment.}

Insofar as children of a testator born after the execution of his will are concerned, clarity of legislation is the principal difference between the Code and Oklahoma law. The Code expressly covers children adopted after execution\footnote{165}{UPC § 2-302(a).} but Oklahoma law has been interpreted to cover them as well.\footnote{166}{Alexander v. Samuels, 177 Okla. 323, 58 P.2d 878 (1936).} In either system the child’s share is that which he would have received had the testator died intestate.\footnote{157}{OKLA. STAT. tit. 84, § 131 (1971).} An Oklahoma child may claim that share if he is “unprovided for by any settlement, and neither provided for nor in any way mentioned in [the] will . . . .”\footnote{158}{OKLA. STAT. tit. 84, § 131 (1971).} A Code child will take unless

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.\footnote{159}{UPC § 2-302(a).}

The second quoted sub-section merits consideration. In the case of a will not ambiguous on its face, Oklahoma law\footnote{160}{See text accompanying note 158 supra.} might allow an afterborn child to disturb the probable plan of the testator that provision for children would be made by his surviving spouse.
The taking of an intestate share by a child born before the execution is narrowly limited under the Code to the situation where the parent fails to provide for the child in the will solely because he believes the child to be dead.\textsuperscript{161} Oklahoma, however, has a pretermitted issue statute. “When any testator omits to provide in his will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional . . .” the person omitted must be given his intestate share.\textsuperscript{162} The court has held “that the gist of the statute is an ‘omission to provide’ rather than omission to name . . . .”\textsuperscript{163} Thus a statement in a testator’s will that he has no children, when indeed the opposite is true,\textsuperscript{164} or a statement specifically naming, but not providing for, issue living at the time of execution of the will\textsuperscript{165} appears sufficient to find an intentional omission. On the other hand the mere naming of one issue to identify another heir does not appear to preclude the former from an intestate share.\textsuperscript{166} If Oklahoma follows the California interpretation of an identical statute\textsuperscript{167} that the testator’s disinheritance in his will of a child, who predeceased him, precludes that child’s unmentioned issue from receiving an intestate share,\textsuperscript{168} the probable plan of a testator that provision for his issue would be made by his surviving spouse would not be disturbed. Nonetheless, as it has been the source of considerable litigation, the Oklahoma statute appears ripe for legislative review.

\textsuperscript{161} See UPC § 2-302(b).
\textsuperscript{162} OKLA. STAT. tit. 84, § 132 (1971).
\textsuperscript{163} In re Estate of Daniels, 401 P.2d 493, 496 (Okla. 1965), citing In re Revard’s Estate, 178 Okla. 524, 63 P.2d 973 (1937).
\textsuperscript{165} See Pease v. Whitlatch, 397 P.2d 894 (Okla. 1964).
\textsuperscript{166} In re Estate of Daniels, 401 P.2d 493 (Okla. 1965).
\textsuperscript{167} Ch. 72, § 17, [1850] Cal. Stat. 179 (now CAL. PROB. CODE § 90 (West 1956)).
\textsuperscript{168} See In re Barter’s Estate, 86 Cal. 441, 25 P. 15 (1890).
Part 4. Exempt Property and Allowance

The recognized purpose of exemptions and allowances is to provide some protection to the surviving spouse and certain children of a decedent from claims of unsecured creditors and persons who may take under his will. Nominally at least, Oklahoma and the Code have the same protections; there is, however, some difference in detail and there can be considerable difference in the value of those protections.

Homestead allowance under the Code is limited to five thousand dollars. It is exempt from and has priority over all claims against the estate and is in addition to all other benefits that may be claimed unless the decedent's will provides otherwise. The Commissioners recognize that the need for uniformity among the states in the family protection area is not great. A stated dollar figure is chosen primarily as it relates to summary handling of small estates, and an alternative provision is suggested for constitutional homestead states.

The Constitution of Oklahoma provides that:

The homestead of any family in this State, not within any city, town, or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall

169 UPC § 2-401. The $5,000 figure is suggested only. See UPC, art. II, pt. 4, General Comment.
170 See UPC § 2-401.
171 See UPC, art. II, pt. 4, General Comment.
172 See id.; UPC § 2-401, Comment. See UPC, art. III, pt. 12.
173 The value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.

UPC § 2-401A.
consist of not exceeding one acre of land, to be selected by the owner: Provided, That the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; And Provided Further, That in case said homestead is used for both residence and business purposes, the homestead interest therein shall not exceed in value the sum of five thousand dollars . . . .

The mere statement of the law makes it apparent that wide disparity in dollar value will exist among Oklahoma homesteads. The disparity becomes more apparent when it is recognized that the homestead right carries with it the right to profits from minerals extracted from homestead land. It is, however, within the power of the legislature to provide a simple, equal homestead right in the pattern of the Code.

The Code also uses a dollar figure for exempt property. The surviving spouse, if any, or the children of a decedent, including adults, are entitled to a net value of thirty-five hundred dollars in household furniture, automobiles, furnishings, appliances and personal effects. The exempt property allowance may be brought up to full value by including other assets of the estate and is subject to abatement only to pay homestead and family allowances. The right is in addition to other benefits which may be claimed unless the decedent's will provides otherwise.

Oklahoma has chosen to list exempt property and divide it into two categories. In the first category are items not con-

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176 See Okla. Const. art. XII, § 3.
177 The Code homestead allowance is limited to the surviving spouse, if any, or minor children. See UPC § 2-401.
178 UPC § 2-402.
179 Id.
sidered assets of a decedent's estate. Included are family pictures, pews and burial lots, books not exceeding one hundred dollars in value, the family's wearing apparel, provisions and fuel for the family for one year, and all household and kitchen furniture. In the second category are listed items that are subject to be sold only if necessary to pay expenses of the last illness, funeral charges and expenses of administration. The list, which consists largely of domesticated animals and implements of husbandry, seems primarily designed to protect farmers, though it does include some wage protection. Most Oklahomans might be surprised to learn that a watch is wearing apparel, a piano is household furniture, a farm tractor is an implement of husbandry, but disappointed that the family automobile is not a carriage or buggy. Is a valuable oil portrait of an important ancestor a family picture? In addition to avoiding difficult problems of interpretation, the Code provision treats equally all to whom it applies.

Of the family protections conferred by the Code and Oklahoma law, the family allowances are most nearly similar. Where the Code makes the allowance a matter of right, in Oklahoma it is discretionary with the court should the home-

180 OKLA. STAT. tit. 58, § 311 (1971).
181 OKLA. STAT. tit. 58, § 312 (1971).
182 See OKLA. STAT. tit. 31, § 1 (1971).
183 In re Carter's Estate, 113 Okla. 182, 240 P. 727 (1925).
184 Cook v. Fuller, 35 Okla. 339, 130 P. 140 (1913).
187 See 1 R. Huff, supra note 143, at 188.
188 The Commissioners stress that exemptions and allowances should apply only to domiciliaries. UPC, art. II, pt. 4, General Comment.
189 UPC § 2-403.
stead and exempt property be insufficient for maintenance of the family. Under the Code the allowance has priority over all claims except homestead allowance; in Oklahoma, funeral charges and expenses of administration are preferred. In both systems the amount of the allowance is based largely on the previous standard of living of the family. The Code permits consideration of the surviving spouse's other income in setting the amount of the allowance; apparently Oklahoma does not. A Code allowance in excess of five hundred dollars per month can be made only by order of court. In neither system can the allowance continue for longer than one year if the estate is insolvent; neither allowance qualifies for the estate tax marital deduction. The Code provides that the family allowance is in addition to other benefits unless the decedent's will provides otherwise; it may be an absolute right in Oklahoma.

Because it uses dollar figures for the homestead and exempt property allowances, the Code provides that property specifically devised is not to be used to satisfy those rights if

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191 UPC § 2-403.
194 UPC § 2-403, Comment.
195 In re Finston's Estate, 288 P.2d 383 (Okla. 1955); In re Crane's Estate, 201 Okla. 354, 206 P.2d 726 (1949). Okla. Stat. tit. 58, § 318 (1971) apparently prefers the minor children over the widow only in regard to the setting apart of exempt personal property not subject to levy and execution. 1 R. Huff, supra note 143, at 201.
196 UPC § 2-403, Comment; UPC § 2-404.
198 Darby's Estate v. Wiseman, 323 P.2d 792 (10th Cir. 1963); UPC § 2-403, Comment.
199 See UPC § 2-403.
the estate is otherwise sufficient. Subject to this restriction, however, a selection of property may be made by the person entitled to homestead or exempt property.

**Part 5. Wills**

The provisions of the Uniform Probate Code relating to capacity and formalities of will execution and revocation seek to validate a will whenever possible. Consequently adoption of the Code would have the effect of softening some of the more stringent requirements of Oklahoma law in this area.

The Oklahoma requirement that a testator publish his will to two attesting witnesses and that they sign in his presence would be eliminated. Under the Code the testator need only acknowledge to the witnesses that the signature is his or that the document is his will. Nor does the Code require the testator's signature to be at the end of the will. Both systems, however, permit self-proved wills.

A holographic will under the Code is valid if the signature and the material provisions of the will are in the testator's handwriting. "A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will." Oklahoma, on the other hand, requires not only that the document be entirely written by the testator but that it also be dated.

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201 UPC § 2-404.
202 Id.
203 See UPC, art. II, pt. 5, General Comment.
204 OKLA. STAT. tit. 84, § 55 (4) (1971).
205 UPC § 2-502; id., Comment.
207 OKLA. STAT. tit. 84, § 55 (5) (1971); UPC § 2-504.
208 UPC § 2-503.
209 Id., Comment.
210 OKLA. STAT. tit. 84, § 54 (1971).
The Code provides that any person generally competent to be a witness may witness a will and that no provision of a will is invalid because of attestation by an interested witness.\(^{211}\) Although they discourage the use of interested witnesses, the Commissioners recognize that a requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence.\(^{212}\) The test in Oklahoma of the competency of a witness to a will is his competency to testify in court. It is to the statutes on civil procedure that one must look to determine a witness' competency.\(^{213}\) Thus if the spouse of a devisee has attested a will and his testimony is necessary to prove it, the will cannot be admitted to probate.\(^{214}\) On the other hand if the testimony of an otherwise competent witness is required to prove the will, he will lose the benefits conferred on him by the will\(^{215}\) unless he is also an heir at law. If he is an heir, he will receive the lesser of the will benefits or his intestate share.\(^{216}\)

Oklahoma has broad choice of law rules concerning the validity of a will. It is valid if executed in compliance with Oklahoma law, the law of the place where it was executed, or the law of the testator's domicile at the time of execution.\(^{217}\)

\(^{211}\) UPC § 2-505.
\(^{212}\) Id., Comment.
\(^{213}\) 1 R. Huff, Oklahoma Probate Law and Practice § 146, at 91 (1957).

The Code not only adopts these references but also adds the law of testator's domicile at death and the law of the place where, at execution or death, the testator has a place of abode or is a national.218

There are no significant differences in Oklahoma law and the Code on will revocation.219 Revival of revoked wills, however, appears to be more liberal under the Code. Where a second will, revoking a first will in whole or in part, is itself revoked, the Code provides that “the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will take effect as executed.”220 In Oklahoma, a revival of the former will can be accomplished only by republication of it, “unless it appears by the terms of such revocation [of the second will] that it was [testator's] intention to renew the former will . . . .”221 The prevailing view of courts interpreting a statute similar to Oklahoma's seems to be that the language “by the terms of such revocation” refers only to revocation by an attested writing and that the testator's intention to revive his former will cannot rest in parol.222 It appears

218 UPC § 2-506.
219 See OKLA. STAT. tit. 84, §§ 101-03, 105, 112-13 (1971); UPC § 2-507. Revocation of wills executed in duplicate, see OKLA. STAT. tit. 84, § 104 (1971), is not covered in the Code. Both systems provide partial revocation by operation of law of all will benefits in favor of a subsequently divorced spouse, though the Code revives those benefits in case the testator and his former spouse remarry. See OKLA. STAT. tit. 94, § 114 (1971); UPC § 2-508. See note 217 supra.
220 UPC § 2-509(a). Revocation of a second will by a third will does not revive a first will, “except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.” UPC § 2-509(b).
221 OKLA. STAT. tit. 84, § 106 (1971).
that Oklahoma would subscribe to the prevailing view. By admitting parole evidence, the Code would allow the testator's true intention concerning the status of a former will to be ascertained.

The two systems permit matters outside the will to be given effect in the disposition of a testator's property. Both incorporate the Uniform Testamentary Additions to Trusts Act. The doctrine of incorporation by reference, codified by the Code, is part of Oklahoma's common law. Property may be disposed of conditionally or by reference to events of independent significance. The Code has an additional desirable provision, however, not present in Oklahoma law. Reflecting "the broader policy of effectuating a testator's intent and of relaxing formalities of execution," the Code permits a testator to refer in his will to a separate document disposing of tangible personality, excluding money, evidences of indebtedness, documents of title, securities, and property used in trade or business. If the document is in the testator's handwriting or signed by him and describes the property and the intended recipients, it will be given effect. It is immaterial that the document is prepared before or after the execution of the will or is altered from time to time. The provision would be of immeasurable value to the lawyer in the typical case of a client who has frequent changes of mind as to the disposition of his personal effects.

Oral, or nuncupative, wills are not permitted by the Code. Although they are recognized in Oklahoma, the severe restrictions on the amount of property that can be bequeathed,

224 OKLA. STAT. tit. 84, §§ 301-04 (1971); UPC § 2-511.
225 UPC § 2-510.
227 OKLA. STAT. tit. 84, §§ 179-83 (1971).
228 UPC § 2-512.
229 UPC § 2-513, Comment.
230 UPC § 2-513; id., Comment.
the narrow conditions under which they can be made, and the problems of proving them make them of little consequence.

Part 6. Rules of Construction

A will is interpreted to give effect to the testator's intention. In the absence of a contrary intention expressed in a will, however, courts apply statutory rules of construction as presumptive of the testator's intention. Thus a statutory rule may be avoided by the testator's manifesting a different intention.

As it does in the case of intestate succession, the Code provides that "[a] devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator ...." The provision is not given effect, however, if the will explicitly deals with simultaneous or common-disaster deaths or otherwise requires survival. Oklahoma does not have a comparable provision.

The Code permits a testator to select the local law of any state to govern the meaning and legal effect of dispositions in his will. That law will be followed unless it is contrary to the otherwise applicable public policy of the Code state; the location of the property disposed of is immaterial. Oklahoma has the traditional rule that a will, as it relates to disposition of Oklahoma land is interpreted according to its law, but that a will relating to personal property disposition is interpreted according to the law of the testator's domicile.

232 See generally 1 R. Huff, supra note 213, at § 141.
233 Okla. Stat. tit. 84, § 151 (1971); UPC § 2-603.
234 See Okla. Stat. tit. 84, § 153 (1971); UPC § 2-603.
235 See notes 95-99 supra and accompanying text.
236 UPC § 2-601.
237 Id.
238 UPC § 2-602.
239 Id., Comment.
Both systems have the usual rule that property acquired after the execution of the will is passed by it.\textsuperscript{241}

There are significant differences in the anti-lapse provisions of the two systems. In Oklahoma when a will beneficiary dies before the testator, the gift to him lapses unless the will provides otherwise or unless it is saved by the anti-lapse statute.\textsuperscript{242} That statute\textsuperscript{243} prevents lapse of a devise "to any child or other relation of the testator" who leaves lineal descendants. Its full meaning is not entirely clear.\textsuperscript{244} It appears however that a devise to one already dead at the time of execution of the will is void\textsuperscript{245} and is thus not saved by the anti-lapse statute. The void devise is explicitly saved from lapse by the Code. It, too, restricts anti-lapse to issue of blood relatives of the testator; however, in line with the intestate distribution section, the relative can be no more remote than a grandparent or a lineal descendant of a grandparent. Furthermore, the person who would take in lieu of his ancestor must survive the testator by one hundred twenty hours. And finally, the anti-lapse section is made expressly applicable to class gifts,\textsuperscript{246} a point on which no Oklahoma cases have been decided.

If a clause in a will, other than a residuary clause, fails and is not saved from lapse, the property devised becomes part of the residue.\textsuperscript{247} If a residuary clause fails completely, the residue passes by intestacy.\textsuperscript{248} In Oklahoma if the residue is devised to two or more persons not as joint tenants or members of a class, and if one of those persons predeceases the testator and the devise is not saved from lapse, that portion of the

\textsuperscript{241} \textsc{okla. stat.} tit. 84, § 146 (1971); \textsc{upc} § 2-604.
\textsuperscript{242} \textsc{okla. stat.} tit. 84, § 177 (1971).
\textsuperscript{243} \textsc{okla. stat.} tit. 84, § 142 (1971).
\textsuperscript{244} See generally \textsc{1 r. huff}, supra note 213, at § 58.
\textsuperscript{245} See \textit{in re} revard's estate, 178 \textsc{okla.} 524, 63 \textsc{p.2d} 973 (1937).
\textsuperscript{246} \textsc{upc} § 2-605; id., Comment.
\textsuperscript{247} \textsc{upc} § 2-606(a); see \textit{in re} estate of he-ah-to-me, 325 \textsc{p.2d} 746 (\textsc{okla.} 1958).
\textsuperscript{248} See \textsc{okla. stat.} tit. 84, § 213 (1971); \textsc{upc} § 2-101.
residue which failed does not accrue to the benefit of other residuary devisees but passes to the testator's heirs by intestacy.\textsuperscript{249} The Code, on the other hand, provides that the share passes “to other residuary devisees in proportion to their interests in the residue.”\textsuperscript{250}

Recognizing that changes in and accessions to securities specifically devised are frequent sources of litigation,\textsuperscript{251} the Code contains a section spelling out the rights of the specific devisee.\textsuperscript{252} It further provides for limited nonademption in cases where property specifically devised is sold by a conservator and where a condemnation award or fire or casualty insurance proceeds in relation to that property are paid a conservator.\textsuperscript{253} However, in the case of an unprotected testator, Oklahoma and the Code apparently follow the same ademption rule.\textsuperscript{254}

The Code provides that “[a] specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts,”\textsuperscript{255} thus reversing the common law rule.\textsuperscript{256} Oklahoma has a rule of nonexoneration of mortgages on realty,\textsuperscript{257} though it does not extend to mechanics’ and materialmen’s liens\textsuperscript{258} nor, by its terms, to personalty.

In Oklahoma a will with a general residuary clause is interpreted to exercise any testamentary power of appointment

\textsuperscript{249}In re Estate of Levy, 415 P.2d 1006 (Okla. 1966); Dean v. Moore, 380 P.2d 934 (Okla. 1962).
\textsuperscript{250}UPC § 2-606(b).
\textsuperscript{251}See generally T. Atkinson, \textit{supra} note 222, at § 135.
\textsuperscript{252}UPC § 2-607. Apparently Oklahoma has similar legislation only in regard to trusts. See \textit{Okla. Stat. tit. 60, §§ 175.28-29} (1971).
\textsuperscript{253}See UPC § 2-608.
\textsuperscript{254}See id.; In re Barry’s Estate, 252 P.2d 437 (Okla. 1952).
\textsuperscript{255}UPC § 2-609.
\textsuperscript{256}See generally T. Atkinson, \textit{supra} note 222, at § 137.
\textsuperscript{258}Bethel v. Magness, 296 P.2d 792 (Okla. 1956).
The Code adopts the opposite rule unless in the will "specific reference is made to the power or there is some other indication of intention to include the property subject to the power." Thus, surrounding circumstances may evidence an intent to exercise the power. In stressing the need for uniformity in the exercise of powers by will, the Commissioners give two reasons for the Code rule—that it is the majority rule and that, as most powers are created in marital deduction trusts, the donor would prefer that the property pass under his trust in the absence of a specific exercise of the power by the donee.

In order to facilitate the determination of persons to be included in the disposition of property to a class, the Code incorporates for wills its rules for determining relationships for purposes of intestate succession. Oklahoma prescribes the legal effect to be accorded certain terms, such as "heirs", "relations", "issue" and the like. The statutes may be considered on the presumption that the testator knew of them; however, it is his intention as to the meaning of the terms used that controls.

Satisfaction of legacies is similar in the two systems. Oklahoma provides that the testator's intention that a lifetime gift be in satisfaction of a legacy must be expressed by him in writing; the Code requires that the testator's intention be expressed in his will or a contemporaneous writing or indicated in the donee's written acknowledgement of the gift.

See OKLA. STAT. tit. 84, § 164 (1971).
See UPC § 2-610.
See id., Comment.
See UPC § 2-611. See notes 56-57, 69-72, 77-78, 81-83 supra and accompanying text.
OKLA. STAT. tit. 84, §§ 168-69 (1971); see OKLA. STAT. tit. 25, § 7 (1971).
See In re Estate of Ware, 348 P.2d 176 (Okla. 1958). See notes 233-34 supra and accompanying text.
OKLA. STAT. tit. 84, § 185 (1971).
UPC § 2-612.
The Oklahoma chapter on will interpretation contains a number of detailed rules which have no parallel in the Code. As they seem generally to be codifications of the common law, their retention or elimination would appear to have no deleterious effect on the adoption of the Code.

**Part 7. Contractual Arrangements Relating to Death**

This part of the Code contains only one section:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate ... can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

The stated purpose of the section clearly is “to tighten the methods by which contracts concerning succession may be proved.” “Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision is not intended to affect normal rules regarding admissibility of evidence.” Adoption of the Code provision apparently would reverse the rule in cases such as Johnson v. Hazen. In that case a purported holographic will was not admitted to probate because it lacked dating; there is no indication that the “will” mentioned the existence of a contract. Nonetheless the proponent-beneficiary was able to prove the existence of an oral contract to devise, and the “will” was admitted as evidence relevant to that issue. Tucker v. Zachary

268 UPC § 2-701.
269 Id., Comment.
270 Id. (emphasis added). Thus, the operation of a dead man’s statute, see, e.g., Okla. Stat. tit. 12, § 384 (1971), should not be affected.
involved a "joint" holographic will, written and signed by the wife and also signed by the husband, and leaving their property to foster daughters. The wife, as to whom the will was valid, died about one hour before the husband, as to whom the "will" could not be probated. The foster daughters were able to prove that the "will" was executed pursuant to an oral contract for their benefit. If the "will" had not "evidenced the contract," the Code apparently would have precluded recovery. In any event, the Code should prevent recovery in contract where the contract and the evidence of it rest entirely in parol. The current Oklahoma rule that full performance by one of the parties to the oral contract removes it from the Statute of Frauds would be eliminated by the Code's writing requirement. Thus the Code would reduce the amount of oral contract litigation, although the action in quasi contract for quantum meruit apparently is preserved.


"Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciation of an intestate share." If an intestate share is "renounced", the "renunciation" constitutes a transfer of property which may be subject to the imposition of gift taxes, whereas the renunciation of benefits under a will is not subject to be taxed. Since the distinction "cannot be defended on policy grounds" and in order to facilitate estate planning, the Code permits renunciation of testate and intestate

273 See text accompanying note 268 supra.
275 See UPC § 2-701, Comment.
276 UPC § 2-801, Comment.
278 UPC, art. II, pt. 8, General Comment.
279 UPC § 2-801, Comment.
benefits and provides that "the renunciation relates back for all purposes to the date of death of the decedent . . . ." In addition it is provided that the renunciation may be in whole or in part, thus changing the rule that inseparable benefits under a will must be totally accepted or totally renounced. Furthermore the presence of a spendthrift provision will not affect the expanded right to renounce. The right to renounce must be exercised within six months of the decedent's death or the time the taker is ascertained, and the property will pass as if the renouncer predeceased the decedent unless a will otherwise provides.

Will provisions in favor of a spouse are revoked by a subsequent divorce or annulment by Oklahoma law and the Code. The Code, however, expands this principle by creating an estoppel in certain cases, for example, where a divorce or annulment decree may be held invalid, not only to revoke will benefits but also to terminate all statutory rights of a surviving spouse. No person is a surviving spouse who obtains or consents to a divorce or annulment, even though the decree is not recognized in the Code-enacting state, unless the spouses subsequently remarry or live together as man and wife. All benefits are terminated where the decedent obtained a divorce or annulment and the ex-spouse marries an-

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280 See UPC § 2-801(a).
281 UPC § 2-801(c).
282 UPC § 2-801(a).
284 See UPC § 2-801(e).
285 UPC § 2-801(b).
286 UPC § 2-801(c).
287 OKLA. STAT. tit. 84, § 114 (1971).
288 UPC § 2-508. See note 219 supra.
289 See UPC § 2-802; id., Comment.
290 See UPC § 2-802(b) (1). Common law marriage is recognized in Oklahoma. See Aurand v. Aurand, 195 Okla. 643, 161 P.2d 857 (1945); In re Love's Estate, 42 Okla. 478, 142 P. 305 (1914).
other person. Finally, although a legal separation normally does not affect succession rights, being a party to any valid proceeding in which all marital property rights are terminated by court order will create an estoppel to claiming all succession rights based on the marriage relation.

The Code contains an optional section which prevents a person who feloniously and intentionally kills another from taking any benefits which might accrue because of the death. Although similar to Oklahoma's statute, the Code has significant differences. Oklahoma's law applies expressly only to interests in the decedent's estate and insurance proceeds; the Code not only includes these items but expressly adds property held in any form of co-ownership with survivorship rights, beneficiaries of bonds or other contractual arrangements, and generally any other acquisition of property or interest by the killer because of the death. While Oklahoma requires a conviction of murder or manslaughter in the first degree for the statute to become operative, the Code makes such a conviction conclusive but not the only means of coming within the section's application. "In the absence of a conviction of felonious and intentional killing the Court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section." Thus, where the killer has committed suicide or otherwise cannot be or is not brought to trial, or even in the face of a verdict of acquittal, the court in a probate proceeding may determine that the section is to be applied. The rights of purchasers for value and without notice of property interests from the killer are

201 UPC § 2-802(b) (2).
202 See UPC § 2-802(a); UPC § 2-802, Comment.
203 UPC § 2-802(b) (3); cf. UPC § 2-204.
204 See UPC § 2-803.
206 See id.
207 See UPC § 2-803.
209 UPC § 2-803 (e).
210 See UPC § 2-803, Comment.
protected, as are obligors making payment to the killer without notice of a claim under the section. 301

Part 9. Custody and Deposit of Wills

Both Oklahoma and the Code provide for deposit of wills for safekeeping with an appropriate court. 302 The duties of the court in regard to a will’s confidentiality and delivery are similar. 303 The Code does provide, however, that a conservator may examine the will of a protected testator under Court procedures which will maintain its confidentiality insofar as is possible. 304

Both systems also place a duty on the custodian of a will after notice of the testator’s death to deliver the will to a person able to secure its probate or to the appropriate court and provide that damages occasioned by a failure to deliver are assessable. 305 In addition the court may compel delivery of a will and punish a recalcitrant for contempt of court. 306

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The foregoing comparison of what perhaps may best be called the substantive provisions of wills and estate law might tend to suggest to many that Oklahoma would benefit from a re-examination of its law in light of the philosophy and thought which went into the drafting of the Uniform Probate Code. By such an examination it can be determined whether Oklahoma law still today is successful in achieving what should be its ultimate goal — that family protection in the devolution of his property which best effectuates the probable expectations and intentions of Oklahoma decedents.

Part II of this study will examine the procedures for concluding a decedent’s affairs and transferring his property to others, as well as non-probate transfers and trust administration.

301 UPC § 2-803(f). Oklahoma law also provides the latter protection. OKLA. STAT. tit. 84, § 231 (1971).
302 OKLA. STAT. tit. 84, § 81 (1971); UPC § 2-901.
303 See OKLA. STAT. tit. 84, §§ 81-83 (1971); UPC § 2-901.
304 UPC § 2-901.
305 OKLA. STAT. tit. 58, § 21 (1971); UPC § 2-902.
306 OKLA. STAT. tit. 58, § 24 (1971); UPC § 2-902.