

# PARTING IS SUCH SWEET SORROW, BUT DOES IT HAVE TO BE SO COMPLICATED? TRANSMISSION OF PROPERTY AT DEATH IN VERMONT\*

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## INTRODUCTION

Terry and Chris are a couple who live in Vermont;<sup>1</sup> they have two children, Adam and Beth. The family home is in Terry's name and has a value of \$175,000. Terry owns stocks and bonds worth \$300,000 and investment real estate worth \$200,000. Terry also owns a car, wearing apparel, and household goods that have negligible value. Terry dies intestate. Under existing Vermont Law, Chris as the survivor will receive: (1) a \$75,000 homestead allowance,<sup>2</sup> (2) the wearing apparel, one-third of the value of the car and household goods,<sup>3</sup> (3) one-third of the stocks and bonds,<sup>4</sup> and (4) one-third of the real property, for a total of \$275,000.<sup>5</sup> The

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1. In Vermont, the parties to a civil union have the same benefits, protections and responsibilities as to spouses in a marriage and are included in all definitions and uses of the term "spouse," "next of kin," and the like. VT. STAT. ANN. tit. 15, § 1204 (2002). Specifically, the "laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property" apply to parties to a civil union. VT. STAT. ANN. tit. 15, § 1204(e)(1). The terms "spouse" and "partner" as used throughout this article in reference to Vermont law refer both to parties to a marriage as well as to parties to a civil union.

2. VT. STAT. ANN. tit. 27, §§ 101, 105 (1998).

3. The survivor is not entitled to "all household goods, furnishings, furniture and household outfit belonging in and to the decedent's immediate household" unless the decedent dies without issue. VT. STAT. ANN. tit. 14, § 403 (2002). Because Terry and Chris have two children, Chris will be entitled to only one-third of the household furnishings under §401, no matter how old the children are. *See infra* note 4.

4. VT. STAT. ANN. tit. 14, § 401. The probate court may award more than one-third depending on the decedent's and the survivor's circumstances. *Id.* Receiving more than one-third is, however, within the discretion of the probate court and will vary from case to case as well as from court to court. *Frost v. Estate of Frost*, 40 Vt. 625, 627 (1868); *Phelps v. Phelps*, 16 Vt. 73, 74 (1844) ("The law has in no way limited the amount which the widow is entitled to receive . . . except by the judgment and discretion of the Probate Court.").

children, regardless of their ages, will receive two-thirds of the property, i.e., two-thirds of the value of the car and household goods, \$200,000 of the stocks and bonds, and \$200,000 of the real property.<sup>6</sup>

If, instead, Terry and Chris lived in a jurisdiction that had adopted the Uniform Probate Code, Chris would receive all of Terry's property.<sup>7</sup>

Robin and Leslie also live in Vermont. They have been partners for twenty-five years. Robin has two children, Carl and Diane, from a prior relationship. The family home is in Robin's name and has a value of \$275,000. Robin owns stocks and bonds worth \$900,000 and investment real estate worth \$700,000. Robin also owns a car, wearing apparel, and household goods worth \$60,000. Robin's will bequeaths the home, car, wearing apparel, and household goods to Leslie and the residue, i.e., the stocks and bonds and investment real estate, to Carl and Diane. If Leslie waives the provisions of the will,<sup>8</sup> Leslie will receive only (1) a \$75,000 homestead allowance,<sup>9</sup> (2) the wearing apparel, and one-third of the value of the car and household goods,<sup>10</sup> i.e., \$20,000, (3) \$300,000 of the stocks and bonds,<sup>11</sup> and (4) \$300,000 of real property.<sup>12</sup> The children will receive \$40,000 of the miscellaneous personal property, \$600,000 of the stocks and bonds, and \$600,000 of the real property.

If they lived in a jurisdiction that had adopted the Uniform Probate Code, and assuming that Leslie owned no other property, Leslie would receive (1) a \$15,000 homestead allowance,<sup>13</sup> (2) \$10,000 of the household furnishings, automobile, or similar property,<sup>14</sup> and (3) one-half of the remaining property, i.e., \$955,000.<sup>15</sup>

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5. VT. STAT. ANN. tit. 14, §§ 461, 474.

6. *See id.* § 551(1) (providing that the decedent's children will receive the real and personal property not otherwise bequeathed after the surviving spouse's one-third share has been distributed).

7. UNIF. PROBATE CODE § 2-102(1)(ii) (amended 1990), 8 U.L.A. 81 (1998). If Chris and Terry are a same-sex couple, state law other than the statutes of descent and distribution will determine whether or not Chris, as survivor, is entitled to any property. *See infra* note 45.

8. The intestacy provisions apply where the surviving spouse waives the provisions of the will. VT. STAT. ANN. tit. 14, § 402.

9. VT. STAT. ANN. tit. 27, §§ 101, 105 (1998).

10. The survivor is not entitled to "all the household goods, furnishings, furniture and household outfit belonging in and to the decedent's immediate household" unless the decedent dies without issue. VT. STAT. ANN. tit. 14, § 403. The probate court may award more than one-third of the personal property depending on the decedent's and the survivor's circumstances, but is far less likely to do so in an elective share situation than in intestacy. *Id.* § 401.

11. *Id.* § 401.

12. *Id.* §§ 461, 474.

13. *See* UNIF. PROBATE CODE § 2-402 (amended 1990), 8 U.L.A. 139 (1998) (noting that \$15,000 is the amount recommended, although the state legislature may insert a different amount).

14. *Id.* § 2-403, 8 U.L.A. 141.

15. *See id.* § 2-202, 8 U.L.A. 102 (allowing a surviving spouse fifty percent of the augmented estate if the surviving spouse was married to the decedent for fifteen years or more).

Pat is 65 years old and lives in Vermont. Pat owns hundreds of antiques, knick-knacks, curios, and mementoes. Pat has four children, ten grandchildren, and countless friends. Pat wants to give specific items to each of these people at death. Under existing Vermont law, Pat could (1) include each specific bequest in his will, (2) create a list specifying which individual is to receive which item *before* signing a will and incorporating that list by reference into the will, or (3) bequeath “my antiques, knick-knacks, curios and mementoes” to “my surviving children, grandchildren, and [insert the names of Pat’s friends]” in the will and trust them to divide the property appropriately among themselves. Under the first or second option, Pat would need to execute a new will or codicil, with all the appropriate formalities,<sup>16</sup> each time he changed his mind about the disposition of one of these items.

If Pat lived in a jurisdiction that had adopted the Uniform Probate Code, Pat could include a general provision in the will indicating that these items were to be distributed in accordance with a list and then Pat could create the list *before* or *after* signing the will.<sup>17</sup> Pat could continue to revise the list from time to time without executing a new will or codicil.<sup>18</sup>

Which result is better in each of these situations? In the first situation, almost everyone would agree that Chris, the survivor, should receive most, if not all, the property, regardless of the ages of the children.<sup>19</sup> This is the result under the Uniform Probate Code, but not under existing Vermont law.<sup>20</sup> If Terry had no children but was survived by four third-cousins-twice-removed, everyone would agree that Chris, the surviving spouse or

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16. See *infra* Part IV.A.

17. See UNIF. PROBATE CODE § 2-513 (amended 1990), 8 U.L.A. 158 (1998) (“[A] will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will . . . . [I]t may be prepared before or after the execution of the will . . . .”).

18. *Id.*

19. See, e.g., Mary Louise Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 319, 355–58 (1978) (documenting most people’s belief that their surviving spouse should receive a larger share of their estate than adult children); Contemporary Studies Project, *A Comparison of Iowans’ Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1081–83 (1978) (detailing the strong policy arguments that support the Uniform Probate Code’s provision giving preference to a surviving spouse rather than children); Mary Louise Fellows, et al., *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L. F. 717, 726, 729 [hereinafter Fellows, *An Empirical Study*] (providing evidence from a study of Illinois residents indicating that most people prefer their surviving spouse to take most of the property).

20. While it is theoretically possible for a Vermont probate court to award the surviving spouse or partner all of the personal property under title 14, section 401 of the Vermont Statutes Annotated, it is not clear that any probate court, or all probate courts, would do so. Moreover, there is no such flexibility with regard to real property. See VT. STAT. ANN. tit. 14, §§ 461, 474 (providing that a widow or widower “shall” be entitled to one-third the value of the real estate).

partner, should receive all of the property. Yet even in this situation, the four third-cousins-twice-removed would be entitled to approximately half of the property under Vermont law.<sup>21</sup>

In the third situation, everyone would also agree that the Uniform Probate Code offers a better solution to the vexing problem of distributing those innumerable personal items to loved ones. Section 2-513 of the Uniform Probate Code allows a decedent the flexibility of changing his or her mind with respect to the distribution of tangible items of personal property as long as the decedent has taken the trouble to indicate his or her intentions in the will and has signed the list of the items and intended recipients.<sup>22</sup> Existing Vermont law requires that the decedent either trust his or her relatives and friends, not change his or her mind, or execute a codicil with the same formality as a will, i.e., with three witnesses who are within the line of sight of the decedent and each other when they sign the codicil.<sup>23</sup>

The difference between Vermont law and the Uniform Probate Code is not as dramatic in the second situation. How one perceives the equities in this case may vary depending on the needs of the survivor, the survivor's ownership of property, the length of the relationship, the needs of the children, and Robin's reasons for preferring the children.

Should Vermont adopt the Uniform Probate Code? The Vermont Legislature recently posed this question, among many others, to a study committee consisting of two probate judges, a member of the judiciary, the director of judicial education, and representatives of the court administrator's office, the Vermont Bar Association, the Probate and Trust Law Committee of the Vermont Bar Association, Vermont Legal Aid, the Community of Vermont Elders, and the Agency of Human Services.<sup>24</sup> The study committee reached no conclusion and made no recommendation with respect to this issue, suggesting that additional study and analysis of both Vermont law and the Uniform Probate Code was necessary before making a recommendation.<sup>25</sup> The committee did recommend "[t]hat the legislature change the law of intestate succession and spousal rights to an

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21. If the decedent has no issue, the surviving spouse or partner receives \$25,000 plus half the remaining property and the other relatives receive the remainder. *Id.* § 551(2).

22. UNIF. PROBATE CODE § 2-513 (amended 1990), 8 U.L.A. 158 (1998).

23. VT. STAT. ANN. tit. 14, § 5; *see infra* Part IV.A (providing the requisites for will execution in Vermont).

24. S.16, 67th Gen. Assem., Reg. Sess., 2003 Vt. Acts & Resolves 221.

25. VT. PROBATE STUDY COMM., REPORT OF THE LEGISLATIVE STUDY COMMITTEE CONCERNING THE STRUCTURE, ORGANIZATION AND JURISDICTION OF THE VERMONT PROBATE COURTS 13 (2004).

understandable system reflecting the complexities of modern family configurations.”<sup>26</sup>

This article examines the issue not addressed by the committee, i.e., whether Vermont should adopt the Uniform Probate Code, specifically Article II which contains substantive provisions governing intestacy, wills, and donative transfers. This article does not address the procedural aspects of the Uniform Probate Code, i.e., Article III, or the issue of guardianships, i.e., Article V of the Uniform Probate Code.<sup>27</sup> Part II presents the history and general policies underlying the Uniform Probate Code. Part III compares the intestacy provisions of existing Vermont law with those of the Uniform Probate Code, and Part IV does the same for the spousal elective share and omitted heir provisions. Part V analyzes doctrines governing wills under both the Uniform Probate Code and existing Vermont law.

The article concludes that adoption of Article II of the Uniform Probate Code would improve many aspects of Vermont law governing intestacy, wills, and donative transfers. Doing so would clarify existing law and bring the rules governing these issues closer to the average decedent's expectations. Doing so would also simplify many aspects of Vermont jurisprudence and provide guidance to both judges and practitioners on a myriad of issues. The decision to adopt the Uniform Probate Code, however, would not be without costs. The issue for Vermont is whether those costs are worth the benefits.

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26. *Id.* In making this recommendation, the committee suggested that the legislature consider adopting a proposal to simplify the intestate and elective share provisions previously recommended by the Vermont Probate Judges Association. *Id.* That proposal is attached to the Report of the Committee as Appendix G. *Id.* The proposal of the probate judges would, among other things: (a) abolish dower and curtesy; (b) eliminate all gender distinctions in the intestacy and elective share provisions; (c) eliminate the distinctions between real and personal property; (d) give the surviving spouse the entire estate if an intestate decedent had no descendants or if all of the decedent's descendants were also the descendants of the surviving spouse; (e) give the surviving spouse who elects against the will a share of the decedent's property equal to 33% plus twice the number of years of the marriage but not to exceed 50% if the decedent had no descendants who were not also the descendants of the surviving spouse but only 15% plus twice the number of years of the marriage but not to exceed 50% if the decedent did have descendants who were not the descendants of the surviving spouse; and (f) give the surviving spouse the household goods and furnishings of an intestate decedent if none of the decedent's descendants object. *Id.* app. G.

27. The issue of guardianships in Vermont was addressed in Daniel F. Grossman, Note, *The Appointment of Guardians by Will: A Comparison of Vermont's Statutory Provisions with the Provisions of the Uniform Probate Code*, 4 VT. L. REV. 275 (1979), and Linda O. Smiddy, Note, *Guardianship for the Adult: A Need for Due Process Protections in Vermont*, 4 VT. L. REV. 95 (1979).

## I. HISTORY AND PURPOSE OF THE UNIFORM PROBATE CODE

The Uniform Probate Code (UPC) is one of many acts drafted by The National Conference of Commissioners on Uniform State Laws (NCCUSL), a non-profit association established in 1892 “to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable.”<sup>28</sup> The UPC began with a suggestion by Professor Thomas E. Atkinson to the American Bar Association (ABA) Section of Real Property, Probate and Trust Law in 1940 that the section prepare a Model Probate Code, and the section did so in 1946.<sup>29</sup> The model act served as the basis for the revision of probate laws in several jurisdictions, but far less than a majority of states adopted it.<sup>30</sup> In 1962, J. Pennington Straus, Esq. suggested that the Model Act be revised and consolidated with a number of uniform acts in related areas.<sup>31</sup> Both NCCUSL and the ABA Section on Real Property, Probate and Trusts created study committees and then a reporting staff to draft a uniform probate code.<sup>32</sup> In 1969, after six years of work and six drafts, the UPC was approved by NCCUSL and the ABA House of Delegates.<sup>33</sup> The UPC has been amended a number of times since 1969. In 1990, Article II was

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28. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS CONST. art. 1.2, available at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=3&tabid=18#Article1> (last visited July 4, 2005).

The American Bar Association (ABA) was established in 1878, and one of its major objectives was to promote uniformity of legislation throughout the United States. EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK, 5–6, 50 (1953). The four principal standing committees of the ABA made a number of modest suggestions for uniformity in the earliest years, including that the laws regarding the execution of wills be made uniform. *Id.* at 50–51. Because little progress had been made, the ABA created a Committee on Uniform States Laws in 1889. *Id.* at 52. At the same time, the State of New York created a board of three commissioners for the promotion of uniformity of legislation in the United States. *Id.* The A.B.A. committee quickly adopted the New York approach and recommended that the A.B.A. request that all jurisdictions do the same and invite representatives from all the states to a convention to draft uniform laws. *Id.* at 53. Thus, the National Conference of Commissioners on Uniform State Laws was born.

29. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 895 (1992) [hereinafter Averill, *Eclectic History*]; LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL 5–6 (5th ed. West 2001) [hereinafter AVERILL, NUTSHELL].

30. Averill, *Eclectic History*, *supra* note 29, at 895.

31. J. PENNINGTON STRAUS, ACLEA NATIONAL CONFERENCE ON THE UNIFORM PROBATE CODE: HISTORY AND ORIGIN OF THE UNIFORM PROBATE CODE 8–9 (1972); Averill, *Eclectic History*, *supra* note 29, at 895–96.

32. Averill, *Eclectic History*, *supra* note 29, at 896; AVERILL, NUTSHELL, *supra* note 29, at 6.

33. *Uniform Probate Code Approved by Council*, 4 REAL PROP. PROB. & TR. J. 206, 206 (1969); Averill, *Eclectic History*, *supra* note 29, at 896; see also Richard V. Wellman, *Law Teachers and the Uniform Probate Code*, 24 J. LEGAL ED. 180, 180–82 (1972) (describing the process used to create the Uniform Probate Code and arguing in favor of law professors participating in such projects).

substantially revised and a number of free-standing uniform acts were incorporated into it.<sup>34</sup>

The primary purposes of the UPC are to (1) modernize and clarify the laws governing intestacy, wills, and other donative transfers, (2) provide uniformity across the country, and (3) establish a simple, straightforward, and efficient probate procedure.<sup>35</sup> Other policies are reflected in specific provisions. For example, the intestacy provisions are designed to establish a suitable estate plan for the typical person of modest means, to reflect the probate intent of the average decedent, and to accommodate modern family structures.<sup>36</sup> The elective share provisions reflect both the partnership theory and the support theory of marriage and seek to accommodate the increasing use of non-probate transfers.<sup>37</sup> The sections governing the execution, revocation, and construction of wills respond to the decline of formalism in the law in favor of determining the testator's intent. These provisions are also designed to provide predictability, provability, and correctness.<sup>38</sup>

The roots of the laws governing the transmission of property between generations at death reach back to the 16th and 17th centuries.<sup>39</sup> At that

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34. Averill, *Eclectic History*, *supra* note 29, at 899.

35. UNIF. PROBATE CODE § 1-102, 8 U.L.A. 26 (1998); *see also* AVERILL, NUTSHELL, *supra* note 29 at 17–18 (indicating the purpose of uniform codes).

36. UNIF. PROBATE CODE art. II, pt. 1, general cmt., 8 U.L.A. 79; *see* Lawrence H. Averill, Jr. & Hon. Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L.J. 631, 639 (1995) (stating that “[a] commonly expressed purpose for intestate succession statutes is to distribute a decedent’s wealth in a pattern that represents a close approximation of that which an average person would have designed had that person’s desires been properly manifested”); Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 928–29 (1992) (discussing the stated purpose of the UPC’s intestacy provisions to reflect the probable intent and wishes of the testator); *see also infra* Part III.

37. UNIF. PROBATE CODE art. II, pt. 2, general cmt., 8 U.L.A. 292; Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code’s Redesigned Elective Share—Why the Partnership Theory Is Not Yet Complete*, 25 IND. L. REV. 1, 2 (1991); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 241, 251 (1991); *see also infra* Part IV.A.

38. UNIF. PROBATE CODE art. II, pt. 5, general cmt., 8 U.L.A. 144; *see* Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 639 (1993) (suggesting that the pre-1990 version of the Uniform Probate Code “is a model of clear and concise drafting” that has “distaste for estate planning esoterica [which] marks it as distinctly ‘consumer friendly’”); Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1033–35 (1994) (discussing how the formal requirements for validating wills has been weakened in the 1990 version of the UPC); *see also infra* Part IV.A.

39. Statute of Wills, 1540, 32 Hen. 8, c. 1 (Eng.), *cited in* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 18 (2d ed. 1953); Statute of Distribution, 1670, 22 & 23 Car. 2, c. 10 (Eng.), *cited in* ATKINSON, *supra*, at 19; *see also* CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 26–27, 32–34, 37–38 (1987) (describing the development of statutory and common law inheritance law in England and America during the 16th and 17th centuries).

time, rules were based on feudal notions of land ownership, a primarily agricultural society, a relatively immobile population, and the status (or lack thereof) of women.<sup>40</sup> The migration to the New World brought few changes to either the laws governing intestacy and wills or the policies underlying them.<sup>41</sup> The Vermont statutes governing intestacy and wills were first adopted in 1787.<sup>42</sup> Although these provisions have been revised from time to time since then, their basic structure and substance remain the same.

Much in our society has changed since these laws were first enacted. Society has migrated from a rural, agricultural society to an urban workforce based in manufacturing and the delivery of goods and services. The primary source of wealth has shifted from real property to personal property, such as stocks, bonds, annuities, and similar intangibles. Our consciousness has expanded from provincial to national to international. Women have the right to work, contract, own property, and vote.<sup>43</sup> The structure of the family has altered. Divorce is more common; an individual is more likely to be married more than once and have children with more than one spouse.<sup>44</sup> Families include children, half-siblings, step-children, and adopted children. Civil unions and domestic partnerships have been legalized.<sup>45</sup> Technology has altered the fundamental definition of who is a parent. There are also new mechanisms for transmitting wealth—joint tenancy with the right of survivorship, revocable trusts, life insurance, annuities, and other payable on death (POD) accounts.

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40. ATKINSON, *supra* note 39 at 11–21, 37–50; *see also* SHAMMAS, *supra* note 39, at 23, 23–30 (detailing that “[i]n medieval England . . . people’s property was distributed among heirs after death [and was] largely dependent upon what kind of property they owned, their social status, where they lived, and their sex”).

41. ATKINSON, *supra* note 39, at 23–30; SHAMMAS, *supra* note 39, at 30–39.

42. STATUTES OF THE STATE OF VERMONT 54 (1791); *see also* Laws of Vermont 1785–1791 202 (John A. Williams ed., 1966).

43. SHAMMAS, *supra* note 39, at 210–13 (1987). *See generally* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 23 (1994) (discussing the “themes and trends that are emerging” in four categories of marital property rights).

44. Approximately forty percent of marriages currently end in divorce. Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 225 (2004).

45. Vermont allows same-sex couples the same benefits as married couples if they participate in a civil union. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002). Massachusetts has recognized the right of same-sex couples to marry. *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003); *see also In re Opinion of the Justices to the Senate*, 802 N.E.2d 565, 568, 572 (Mass. 2004) (advising the Massachusetts legislature that a bill allowing civil unions would not satisfy *Goodridge*). California and Hawaii grant certain rights to “registered domestic partners” and “reciprocal beneficiaries.” CAL. FAM. CODE §§ 297–299 (Supp. 2004) (describing the rights of domestic partners in California and the procedural requirements necessary for recognition of that status in the state); HAW. REV. STAT. § 572C (Supp. 2003).



The provisions of Vermont law governing the transmission of wealth have, by and large, not kept pace with these changes in our society. Although Vermont modernized its adoption statutes in 1996<sup>46</sup> and adopted the Uniform Simultaneous Death Act in 1940,<sup>47</sup> the Uniform Testamentary Additions to Trusts Act in 1961,<sup>48</sup> the Uniform Estate Tax Apportionment Act in 1975,<sup>49</sup> and the Uniform Disclaimers Act in 1985,<sup>50</sup> it has not made any revisions of substantive significance to its intestacy provisions, its elective share provisions, or the provisions governing the execution and revocation of wills since their original enactment in 1787. The statutory provisions are not comprehensive, and there are few cases interpreting the statutes that do exist. Many of these cases were decided in the 19th century.

Individuals want to control the ultimate distribution of their property. Judges need to treat decedents consistently and uniformly. The lack of statutory and judicial guidance in Vermont undermines the ability of individuals and judges to do just that. Moreover, the law is ineffective as a regulator of conduct if it ignores the realities of the lives of its citizens. When law becomes fossilized, it breaks the social contract. In extreme cases, people seek relief outside the bounds of the law or simply ignore it.

The UPC addresses many of these problems. It is the product of intensive study in the 1940s, the 1960s, and the 1980s.<sup>51</sup> As a result, the current version of the UPC reflects the many changes that have affected our society, particularly in the latter half of the 20th century. It provides a comprehensive and integrated set of rules governing the transmission of wealth by will, by non-probate transfers, and by intestacy. It includes not only carefully crafted statutory provisions, but also detailed commentary explaining those provisions. Moreover, eighteen jurisdictions have adopted the UPC,<sup>52</sup> thus creating a significant body of judicial interpretation.

The UPC by its very nature is uniform. Although our country began as a union of individual states, most people in the 21st century have adopted a national perspective. They are surprised to learn that the amount they would receive if their spouse died without a will differs from one

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46. 1996 Vt. Acts & Resolves 262 (codified at VT. STAT. ANN. tit. 15A (2002)).

47. 1941 Vt. Acts & Resolves 52 (codified at VT. STAT. ANN. tit. 14, §§ 621–27 (2002)).

48. 1961 Vt. Acts & Resolves 244 (codified at VT. STAT. ANN. tit. 14, § 2329 (2002)).

49. 1975 Vt. Acts & Resolves 322 (codified at VT. STAT. ANN. tit. 32, §§ 7301–7309 (2001)).

50. 1985 Vt. Acts & Resolves 81 (codified at VT. STAT. ANN. tit. 14, §§ 1951–1959 (2002)).

51. *See supra* notes 32–34 and accompanying text.

52. Cornell Univ. Law School, Uniform Probate Code Locator, at <http://www.law.cornell.edu/uniform/probate.html> (Mar. 2003); Nat'l Conference of Comm'rs on Unif. State Laws, A Few Facts About the Uniform Probate Code, at [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-upc.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upc.asp) (last visited July 4, 2005).

jurisdiction to another and that the requirements for executing a will vary from jurisdiction to jurisdiction. More importantly, the American population is mobile.<sup>53</sup> Although most jurisdictions will admit a will to probate that has been executed in a different jurisdiction, the intestacy laws and elective share provisions may be quite different. These differences magnify the public's distrust of lawyers and the law, create confusion, and often thwart the intentions of the decedent.

The UPC in either its 1969 or 1990 incarnation has been adopted in eighteen states, and it was introduced in Massachusetts in 2004.<sup>54</sup> Although Vermont has adopted some uniform acts governing the transmission of property,<sup>55</sup> it has not adopted the major provisions in article II of the UPC governing intestacy, wills, and other donative transfers. Whether or not Vermont should do so is open to debate. This article provides a comparison of existing Vermont law with corresponding provisions of article II of the UPC. While the treatment will not be exhaustive, it will be illustrative of the major issues.

## II. INTESTACY

The rules governing the descent and distribution of personal property when the decedent dies without a will were codified in the Statute of Distribution in 1670.<sup>56</sup> The Statute of Distribution gave a surviving spouse one-third of the decedent's personal property and the decedent's issue the remainder.<sup>57</sup> If the decedent had no issue, the spouse received one-half and other relatives received the remainder.<sup>58</sup> Representation applied only to the decedent's lineal descendants and children of the decedent's siblings; other collateral relatives only took if they were in equal degrees of kinship.<sup>59</sup>

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53. In 2003, forty million people moved in the United States. UNITED STATES CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2002 TO 2003, at 2 (2004), available at <http://www.census.gov/prod/2004pubs/p20-549.pdf>.

54. See Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 52.

55. See *supra* notes 47–50.

56. Statute of Distribution, 1670, 22 & 23 Car. 2, c. 10 (Eng.), cited in ATKINSON, *supra* note 39, at 19; see also SHAMMAS, *supra* note 39, at 26–27 (describing how the 1670 Statute of Distribution displaced “historic[al] claims of monarch, lord, and church to all or part of the estate”).

57. In England, this statute governed only the distribution of personal property; real property descended to the eldest son under the rules of primogeniture. See ATKINSON, *supra* note 39, at 19 (explaining how the most important thing about the enactment was the “definite scheme of ultimate distribution of chattels between the widow and the children, or next of kin”); Fried, *supra* note 36, at 927 n.2, 937 n.49 (noting that states following the doctrine of primogeniture must deal with real and personal property separately).

58. Fried, *supra* note 36, at 927 (“If a decedent was survived by a spouse, but no issue, the spouse's share increased to one-half of the estate . . .”).

59. *Id.* Assume that decedent has no spouse, issue, siblings, or descendants of her siblings, but

When Vermont enacted its intestacy laws in 1787, it adopted the basic structure of the Statute of Distribution.<sup>60</sup>

At common law, a surviving spouse's share of real property was either dower or curtesy.<sup>61</sup> Dower entitled a widow to a life estate in one-third of her husband's real property, while curtesy entitled a widower to a life estate in all of his wife's real property but only if they had lawful issue.<sup>62</sup> Vermont adopted this scheme in 1787.<sup>63</sup> A separate homestead provision was enacted in 1849,<sup>64</sup> and dower and curtesy were converted to fee interests in 1896.<sup>65</sup> Although the legislature has modified these provisions over the years, the 1787 provisions remain the basic structure of Vermont's intestacy law today.

#### A. Share of the Surviving Spouse or Partner<sup>66</sup>

In Vermont, the share of the surviving spouse depends on whether the decedent has issue or other kindred. Before determining that share, however, the surviving spouse is entitled to a homestead allowance of \$75,000 free and clear of the decedent's debts unless those debts attached to the property prior to the decedent's death.<sup>67</sup> The surviving spouse is also entitled to a reasonable allowance for support during the administration of the estate.<sup>68</sup> The amount of the allowance, and even the grant of any allowance, is within the discretion of the probate court and depends on the resources of the spouse and provisions for the spouse in the decedent's

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that she did have five first cousins. Two of those cousins predeceased the decedent, one leaving two children and the other leaving three children. These children are, of course, the decedent's first cousins once removed. When decedent died intestate, the three surviving first cousins would share the decedent's property and the first cousins once removed would take nothing.

60. STATUTES OF THE STATE OF VERMONT, *supra* note 42, at 54–65; 14 LAWS OF VERMONT 1785–1791, at 202–07 (John A. Williams ed., 1966).

61. Because the elective share in Vermont is essentially identical to the intestate share, the issues raised in Part III also apply to intestacy.

62. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126, 129 (Univ. of Chi. Press 1979) (1766); WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 137 (2d ed. 2001).

63. STATUTES OF THE STATE OF VERMONT, *supra* note 42 at 54–65; *see also* 14 LAWS OF VERMONT 1785–1791, *supra* note 60, at 202. Curtesy was adopted in 1797. 16 LAWS OF THE STATE OF VERMONT 1797, at 237.

64. 1849 Vt. Acts & Resolves 14–16.

65. 1896 Vt. Acts & Resolves 31–36. It is not clear whether Vermont actually abolished dower and curtesy when it converted the life estate to a fee interest. *See infra* notes 146–152 and accompanying text.

66. *See supra* note 1.

67. VT. STAT. ANN. tit. 27, §§ 101, 105, 107 (1998).

68. VT. STAT. ANN. tit. 14, § 404 (2002).

will.<sup>69</sup> The surviving spouse is not entitled to the household goods, furnishings, furniture, or the “household outfit” unless the decedent dies without issue.<sup>70</sup>

After payment of these allowances, the spouse’s share of an intestate decedent’s estate depends on the existence and number of decedent’s issue. For the most part, it does not matter whether the surviving spouse is the parent of decedent’s issue.<sup>71</sup> The amount distributed to the surviving spouse also depends on whether the decedent’s property is real or personal.<sup>72</sup>

These rules are demonstrated by the following example. Assume the decedent is survived by his spouse and four children. The surviving spouse is entitled to (1) all articles of her own wearing apparel and her own ornament as well as the decedent’s wearing apparel,<sup>73</sup> (2) one-third of the decedent’s personal property, which includes the household furnishings and

69. *In re Estate of Davis*, 126 Vt. 19, 23, 220 A.2d 726, 729–30 (1966); *see Leach v. Executor of Leach*, 51 Vt. 440, 442–43 (1878) (refusing to allow an appeal from the probate court’s allocation of maintenance because allowing an appeal would be contrary to the legislature’s intent); *Heirs of Sawyer v. Sawyer*, 28 Vt. 245, 248–49 (1856) (describing the broad discretion given to the probate court when determining the amount of maintenance that the widow of the decedent who dies intestate is entitled to receive).

70. VT. STAT. ANN. tit. 14, § 403 (2002).

71. Compare UNIF. PROBATE CODE § 2-102 (amended 1990), 8 U.L.A. 81 (1998), where the share of the surviving spouse depends on whether the decedent’s issue are also issue of the spouse or not as well as whether the spouse himself has issue who are not issue of the decedent. *See infra* notes 95–100 and accompanying text.

72. VT. STAT. ANN. tit. 14, §§ 401, 461, 474, 551(2) (2002).

73. *Id.* § 401. Although the statute does not explicitly designate that the “wearing apparel and ornament” are those of the surviving spouse, the statute must be interpreted in that manner because otherwise the words “the wearing apparel of the decedent” would be superfluous. This is, moreover, the interpretation of the Vermont court. *See Sawyer v. Sawyer*, 28 Vt. 249, 252 (1856) (describing the wife’s apparel and ornament as “clothing, bedding, &c., suitable to her condition in life, and secondly, her ornaments” and the husband’s wearing apparel as “clothing of the husband, in contradistinction to ornaments”).

In *Sawyer*, the court held that the watch, watch key, watch chain, cords and seals, finger ring, sword, and sword belt of decedent, a naval officer, were not part of his wearing apparel but that his epaulets and bosom pin were. *Id.* at 252–53. The court explained the distinction between wearing apparel and ornament as follows:

The primary motive of the legislature in giving the wearing apparel of the husband, upon his decease, to the wife, was not to make a provision for her support, but to save her from the mortification of seeing his apparel the subject of disposition or sale, as the case might be, for the benefit of creditors, which, ordinarily, would be but of little use to creditors, but in the case of ornaments, which many times are expensive, there may be a strong equity why creditors of an insolvent estate should have the benefit of them.

*Id.* at 252. Justice Redfield, while accepting the rationale of the majority, disagreed with the characterization of the decedent’s sword, watch chain, and finger ring as not part of the decedent’s apparel. *Id.* at 255–56.

similar items,<sup>74</sup> and (3) one-third of the decedent's real property.<sup>75</sup> The probate court has discretion to award more than one-third of the personal property. Section 401 provides that the amount "shall not be less than a third" and that the court shall assign the personal property "according to his or her circumstances and the estate and degree of the decedent."<sup>76</sup>

If the decedent is survived by only one issue who is also the issue of the survivor, then the spouse is entitled to one-half of the real property rather than one-third.<sup>77</sup> The spouse receives the same share of the personal property regardless of the number of issue.

If the decedent has no issue, the surviving spouse is entitled to "all household goods, furnishings, furniture, and household outfit."<sup>78</sup> If the spouse "does not elect to take a third in value of the real estate," then the spouse is entitled to the entire estate only (1) if it does not exceed \$25,000 or (2) if the decedent has no kindred. Otherwise, the spouse is entitled to \$25,000 plus half the remainder.<sup>79</sup>

Section 551 applies to both real and personal property, but only the amount that is "not devised nor bequeathed and not otherwise appropriated and distributed in pursuance of law."<sup>80</sup> To receive the share designated by § 551(2), the surviving spouse must elect not to take the one-third share of the decedent's real property provided by § 461 or § 474. Section 551(2), however, does not explicitly require the spouse to waive the one-third share of decedent's personal property provided by § 401. As a result, it is not entirely clear whether § 551(2) applies to (1) none of decedent's personal property, (2) the two-thirds of the decedent's personal property not already distributed to the surviving spouse under § 401, or (3) all of the decedent's personal property, i.e., the spouse must in fact waive § 401.

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74. VT. STAT. ANN. tit. 14, § 401 (2002). Because the decedent has surviving issue, the surviving spouse is not entitled to all of the household goods and furnishings. *Id.* § 403.

75. *Id.* §§ 461, 474.

76. *Id.* § 401; *see Phelps v. Phelps*, 16 Vt. 73, 74 (1844) (quoting the statute). Whether or not Vermont's probate judges actually award more than one-third of the personal property to a surviving spouse is unknown. Because this discretion cannot be reversed on appeal to the Vermont Supreme Court, there are very few reported cases. Only an empirical study of probate court records would indicate how often judges exercise this discretion and award more than the minimum one-third share. The exercise of discretion can be reviewed on appeal by the superior [formerly county] court. *See, e.g., Frost v. Estate of Frost*, 40 Vt. 625, 628 (1868) (noting that the "fixing [of] the amount of the personal property assigned to the widow . . . depends upon the exercise of the discretion of [the probate] court, though subject to re-examination on appeal by the county court"); *Phelps*, 16 Vt. at 74 (discussing the discretion of the probate court in awarding a widow's share of an estate).

77. VT. STAT. ANN. tit. 14, §§ 461, 474.

78. *Id.* § 403.

79. *Id.* § 551(2).

80. *See id.* (quoting the introductory clause of § 551).

The following example demonstrates the different results produced by these three possibilities. Assume that A and B are married and that neither has any children. A dies survived by spouse B and sister S. A owns a house (fair market value \$175,000, no mortgage), investment real estate (fair market value \$325,000), wearing apparel, household goods, a car (negligible value), and stocks (fair market value \$375,000). B, the surviving spouse, receives a homestead allowance of \$75,000,<sup>81</sup> the wearing apparel of both A and B,<sup>82</sup> and the household goods.<sup>83</sup> In addition, B would receive the amount specified by § 551(2), which depends on which option specified above is correct.

Under the first option, § 551(2) would not apply to any of the decedent's personal property. B would receive (1) the \$75,000 homestead allowance, (2) one-third of the stocks, i.e., \$125,000, under § 401 and (3) \$25,000 plus \$200,000 of the real property under § 551(2).<sup>84</sup> Under this option, B would receive a total of \$425,000.

Under the second option, § 551(2) would apply to the personal property *after* application of § 401. Under this option, B would receive (1) the \$75,000 homestead allowance, (2) one-third of the stocks, i.e., \$125,000 and (3) \$25,000 plus one-half the remainder of the personal and real property, i.e., \$350,000. Under this option, B would receive \$550,000.

Under the third option, B would be required to waive § 401 so that all of the personal property would be subject to § 551(2). Under this option, B would receive (1) the \$75,000 homestead allowance and (2) \$25,000 plus one-half of the remaining real and personal property, i.e., \$412,500. Under this option, B would receive \$487,500.

Which option is the correct one? The introductory language of § 551, i.e., “[t]he real *and personal* estate of a decedent,”<sup>85</sup> would seem to preclude the first option. A literal reading of § 551(2) as well as the introductory language of that section would seem to argue in favor of the second option. The third option, however, may be the most appropriate in terms of equity and consistency. It is also the interpretation adopted in *Harrington v. Harrington's Estate*, where the court held that the predecessor of § 551(2) applied “whether the estate remaining to be

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81. VT. STAT. ANN. tit. 27, §§ 101, 105 (1998).

82. VT. STAT. ANN. tit. 14, § 401.

83. *Id.* § 403.

84. The real property consists of the house (\$175,000) and the investment real estate (\$425,000). The homestead allowance is applied first, leaving \$525,000 of real property subject to § 551(2).

85. *Id.* § 551 (emphasis added).

distributed consists wholly of real estate or wholly of personal estate, or partly of real estate and partly of personal estate.”<sup>86</sup>

The historical development of § 551(2) also supports the third option. In 1821, the statute explicitly provided that “the widow shall be entitled to one-half of the estate of the intestate forever; which shall be in lieu of her dower *and assignment of personal estate*.”<sup>87</sup> In 1896, the legislature changed the wording of this provision, adding the introductory clause, i.e., “[t]he real and personal estate of a deceased person not lawfully disposed of by his last will and not otherwise appropriated and distributed in pursuance of law.”<sup>88</sup> At the same time, the legislature removed the reference to the personal estate in subdivision two, but retained the requirement in that subdivision that the survivor waive her share of the decedent’s real property.

Although the historical development of § 551(2) suggests that the third option is the correct one, the language of the statute seems to contradict that interpretation. Because the Vermont Supreme Court has not ruled explicitly on this issue, a practitioner or a probate judge could interpret § 551(2) either way.

Whichever interpretation is followed, the remainder of the decedent’s property is distributed to the decedent’s issue, if any, or if there are no issue, to decedent’s “kindred.”<sup>89</sup> The surviving spouse is entitled to the entire estate only if the decedent has no kindred. Thus, distant relatives, such as the decedent’s second, third, or even fourth cousins or their ancestors or descendants, would be entitled to approximately half of the intestate decedent’s estate.

Like Vermont, the UPC provides the surviving spouse with a number of allowances before the payment of decedent’s debts. The UPC provides a homestead allowance of \$15,000,<sup>90</sup> an exempt property allowance of \$10,000,<sup>91</sup> and a family allowance.<sup>92</sup> The amount of the homestead allowance is bracketed in the UPC, indicating that each jurisdiction should set the amount at whatever level it believes is appropriate. The exempt property allowance is not a bracketed amount, indicating that the National Conference of Commissioners recommends that specific amount. This

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86. *Harrington v. Harrington’s Estate*, 53 Vt. 649, 651–52 (1880); *see also In re Estate of Copeland*, 123 Vt. 32, 34–36, 179 A.2d 475, 477–79 (1962), where the court interpreted § 551(2) in the context of an election against the will. *See infra* note 161 and accompanying text.

87. 1821 Vt. Acts & Resolves 31, 57 (emphasis added).

88. 1896 Vt. Acts & Resolves 37–38.

89. VT. STAT. ANN. tit. 14, § 551.

90. UNIF. PROBATE CODE § 2-402 (amended 1990), 8 U.L.A. 139 (1998).

91. *Id.* § 2-403, 8 U.L.A. 141.

92. *Id.* § 2-404, 8 U.L.A. 141.

allowance is limited to household furniture, automobiles, furnishings, appliances, and personal effects.<sup>93</sup> Like Vermont, the UPC family allowance depends on the spouse's standard of living and available resources.<sup>94</sup>

After these allowances, the UPC adopts a very different distributional scheme with respect to the share of the surviving spouse as well as which relatives, other than the surviving spouse, are entitled to a share of the decedent's intestate estate. In contrast to the Vermont statutes, which give the surviving spouse the entire estate only if there are no other kindred, the UPC gives the surviving spouse the entire intestate estate when (1) all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse has no other descendants or (2) neither a descendant nor a parent of the decedent survives.<sup>95</sup> The surviving spouse receives the lion's share of the estate, i.e., \$200,000<sup>96</sup> plus three-fourths of the balance, if the decedent has no surviving descendants but at least one parent survives.<sup>97</sup> The remainder passes to the parent.<sup>98</sup> If there are step-children, the surviving spouse is not entitled to the entire estate. Instead, the surviving spouse will receive \$150,000 plus one-half the balance if the spouse has descendants who are not descendants of the decedent<sup>99</sup> or \$100,000 plus one-half the balance if the decedent had descendants who are not the descendants of the surviving spouse.<sup>100</sup> This ensures that the decedent's children, who are not the natural objects of the surviving spouse's bounty, will receive a share of the decedent's estate.

### *B. The Share of Descendants and Collateral Relatives*

The portion of the estate that is not distributed to the surviving spouse in Vermont, or the entire estate if there is no surviving spouse, passes first to the decedent's descendants. If there are no descendants, the property goes to the decedent's parents or the survivor and, if no parent survives, then to the decedent's siblings and their legal representatives.<sup>101</sup> If the decedent leaves no surviving spouse, parents, or descendants of parents,

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93. *Id.* § 2-403, 8 U.L.A. 141.

94. *Id.* § 2-404 cmt., 8 U.L.A. 142.

95. *Id.* § 2-102(1), 8 U.L.A. 81.

96. All of the dollar amounts in § 2-102 are bracketed, indicating that this amount may vary from state to state.

97. *Id.* § 2-102(2), 8 U.L.A. 81.

98. *Id.* § 2-103(2), 8 U.L.A. 81.

99. *Id.* § 2-103(3), 8 U.L.A. 81.

100. *Id.* § 2-103(4), 8 U.L.A. 83.

101. VT. STAT. ANN. tit. 14, § 551(3)-(4) (2002); UNIF. PROBATE CODE § 2-103, 8 U.L.A. 83 (1998).



then Vermont law provides that the estate shall descend in equal shares to the next of kin in equal degree without any right of representation.<sup>102</sup> The UPC, by contrast, distributes the estate one-half to the decedent's paternal grandparents or their descendants and one-half to the decedent's maternal grandparents or their descendants, with the descendants taking by representation.<sup>103</sup> If there are no grandparents or descendants of grandparents, the decedent's estate escheats under the UPC.<sup>104</sup> In Vermont, the decedent's estate escheats only if the decedent has no kindred.<sup>105</sup>

If a decedent's child predeceases her, that child's share passes to his legal representatives both in Vermont<sup>106</sup> and under the UPC.<sup>107</sup> There are two basic systems of representation, and the UPC is a variation on one of them. The classic (sometimes referred to as English per stirpes or strict per stirpes) system of representation divides the property into shares at the first generation, regardless of whether or not there are any survivors in that generation, as long as each person is survived by issue.<sup>108</sup> The modern (sometimes referred to as American per stirpes) system of representation divides the property into shares at the first generation where one or more descendants are alive.<sup>109</sup> Once the initial shares are determined, those shares are carried down the line, i.e., "the stocks," to each succeeding generation.

The difference between these two systems of representation can be demonstrated by the following example. Assume that decedent (D) has two children (A and B) both of who predecease D. A has one child, C, and B has two children, E and F. E also predeceases D, leaving two children G and H. Under the classic system of representation, the property is divided into two shares because D had two children. A's share, one-half, is distributed to C. B's share is split in half because B has two children. F takes one of these shares, i.e., one-fourth of D's property. G and H share the other fourth, i.e., each receives one-eighth. Under the modern system of representation, the division would occur at the grandchildren's generation because both children predeceased D. D's property would be divided into

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102. VT. STAT. ANN. tit. 14, § 551(5).

103. UNIF. PROBATE CODE § 2-103(4), 8 U.L.A. 83.

104. *Id.* §§ 2-103, 2-105, 8 U.L.A. 83-84.

105. VT. STAT. ANN. tit. 14, § 681.

106. *Id.* § 551(1).

107. UNIF. PROBATE CODE § 2-103(1), 8 U.L.A. 83.

108. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.3 cmts. c, d, e (1999); JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 87 (6th ed. 2000).

109. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.3 cmts. c, d, e (1999); DUKEMINIER & JOHANSON, *supra* note 108, at 87.

three shares. C and F would each receive one-third. G and H, as representatives of E, would each receive one-sixth.

The UPC follows the modern system of representation, dividing the property into shares at the first generation where someone is alive.<sup>110</sup> The UPC, however, does not follow a strict representational system. Instead, it distributes the shares per capita at each generation. The result in the above example would be the same under the UPC. If, instead, C had also died leaving one child, J, the initial division would still have been into thirds, with F receiving one-third. J, however, would not receive one-third. Instead, the two-thirds of D's property that would have gone to C and E is split equally among J, G, and H; each receiving one-third of the remaining two-thirds or two-ninths of the total. Under the modern system of representation, J would have received C's one-third, and G and H would have split E's one-third share, receiving one-sixth each.

Vermont does not follow any of these systems of representation. If all decedent's children survive her, they share equally.<sup>111</sup> If at least one child survives and at least one child predeceases the decedent and that child has surviving issue, the deceased child's issue take the deceased child's share. In this case it would not matter which system of representation was followed as each would produce the same result. The differences arise when all of the decedent's children predecease her and they all leave surviving issue.<sup>112</sup> In Vermont, if the surviving issue are all of the same degree of kinship, i.e., they are all the decedent's grandchildren, they will share equally. That is, they take per capita rather than by representation.<sup>113</sup>

If D's surviving issue are not all of the same degree, the result is not clear. Neither the statute nor case law indicates how to distribute the property. Vermont might follow the classic, or English, representation scheme; it might follow the modern, or American, representation scheme; or it might even follow the UPC per capita at each generation scheme. While there is, perhaps, little support for the classic system, the opinion in *In re Martin's Estate* could support either of the other two options.<sup>114</sup>

The system of representation extends beyond the decedent's lineal descendants to the decedent's collateral relatives. Virtually all intestacy statutes in the United States allow descendants of the decedent's parents

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110. UNIF. PROBATE CODE § 2-106, 8 U.L.A. 85.

111. VT. STAT. ANN. tit. 14, § 551(1).

112. See *supra* notes 103–104 and accompanying text.

113. See *In re Martin's Estate*, 96 Vt. 455, 458, 120 A. 862, 863 (1923) (holding “that it was the intention of the Legislature that grandchildren, who alone survive the ancestor, should take equally. In other words, that they should take as heirs, and not by representation”).

114. See *id.* at 457 (rejecting the English approach and noting that “those equally related to an intestate participate equally in his estate”).

and grandparents to inherit.<sup>115</sup> Most jurisdictions allow the descendants of decedent's parents and grandparents to take by representation.<sup>116</sup> A few jurisdictions extend their system of representation to descendants of great-grandparents,<sup>117</sup> and one jurisdiction extends representation to all kindred.<sup>118</sup> Only four jurisdictions other than Vermont limit representation to descendants of parents.<sup>119</sup>

Vermont distributes the decedent's property by representation to descendants of parents only in limited circumstances. If the decedent leaves surviving at least one sibling as well as the issue of other deceased siblings, then the issue of the deceased siblings take their parents' shares by representation.<sup>120</sup> On the other hand, if the decedent leaves only nieces and nephews and the children of deceased nieces and nephews as survivors but no siblings, then § 551(5) applies rather than § 551(4) and the surviving nieces and nephews share equally to the exclusion of the children of the deceased nieces and nephews.<sup>121</sup>

The following example demonstrates the difference between the Vermont system of representation and that of the UPC. Assume that decedent (D) has no spouse, descendants, parents, siblings, or descendants of siblings, but D has two first cousins on her mother's side (A and B) and two first cousins on her father's side (C and E). Also assume that A and E predeceased D; A is survived by one child and E by three children. In Vermont, B and C would each receive one-half of D's property. Under the UPC, B and C would each receive one-fourth, and the four children of D's first cousins (D's first cousins once removed) would share the remaining half of D's property equally, each receiving one-eighth.<sup>122</sup>

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115. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.4 (1999). In many jurisdictions, if there are no lineal descendants, descendants of decedent's parents, or descendants of decedent's grandparents, the property escheats to the state. See, e.g., UNIF. PROBATE CODE §§ 2-103, 2-205 (amended 1990), 8 U.L.A. 84 (1998). In Vermont, the decedent's property escheats only if there are no kindred of any degree. VT. STAT. ANN. tit. 14, § 551(5).

116. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.4 cmts. c, e, h (1999); see, e.g., ARIZ. REV. STAT. § 14-2103 (1995 & Supp. 2003); IDAHO CODE § 15-2-103 (Michie 2001); MINN. STAT. ANN. § 524.2-103 (West 2002); WASH. REV. CODE ANN. § 11.04.015 (West 1998 & Supp. 2004).

117. E.g., 755 ILL. COMP. STAT. 5/2-1 (1992 & Supp. 2004); IOWA CODE ANN. § 633.219(5) (1992 & Supp. 2004); N. J. STAT. ANN. § 3B:5-4 (West 1983 & Supp. 2004); S.C. CODE ANN. § 62-2-103 (Law Co-op 1987 & Supp. 2004).

118. DEL. CODE ANN. tit. 12, § 503 (2001).

119. D.C. CODE ANN. § 19-305 to §19-312 (2001); KAN. STAT. ANN. § 59-506 to §59-509 (1994); LA. CIV. CODE ANN. art. 891 (West 2000 & Supp. 2005); NEB. REV. STAT. ANN. § 30-2302 (Michie 1995).

120. *Gaines v. Estate of Strong*, 40 Vt. 354, 360 (1866); see VT. STAT. ANN. tit. 14, § 551(4) (2002) (noting that the legal representatives of deceased brothers and sisters are their issue).

121. *Hatch v. Hatch*, 21 Vt. 450, 453, 455 (1849).

122. UNIF. PROBATE CODE § 2-106 (amended 1990), 8 U.L.A. 85 (1998).

The limited scope of representation in Vermont follows the original Statute of Distribution. The restrictive scope of representation appears anomalous in light of Vermont's anti-lapse statute.<sup>123</sup> When the decedent leaves property to any kindred and that kindred predeceases the decedent, the kindred's issue receive the devised property unless the decedent provides otherwise in her will. Under the anti-lapse statute, the issue would take their parent's, or ancestor's share, presumably by representation.<sup>124</sup>

In both situations—intestacy and lapse—the problem is the same, i.e., how to distribute the decedent's property when the person designated by the intestacy statute or the decedent's will predeceases the decedent. In both situations the underlying policy is the same, i.e., how to give effect to the decedent's probable intent. Vermont chose a different solution in each case. In intestacy, the property passes by representation only to the decedent's issue or offspring of siblings; in all other cases, the property is shared only by the decedent's kindred who are of equal degree. Under the anti-lapse statute, the issue of any kindred who is devised property by the decedent may take their deceased ancestor's share. There is no justification for this distinction.

To what degree representation should extend is a matter subject to debate. Vermont law follows the Statute of Descent in this respect and limits representation to only a few situations. It prefers that kindred of equal degrees share equally to the exclusion of the next degree even where that next degree are the children of nieces and nephews or the children of first cousins. The UPC, on the other hand, provides a balance between equality and representation by allowing representation for all descendants of grandparents but requiring equal (per capita) distributions at each generational level.

### C. Status

Status indicates who is entitled to share decedent's wealth. Many issues of status are the same under existing Vermont law and the UPC. For example, kindred who are related only by half blood inherit the same as if they were of the whole blood.<sup>125</sup> Generally, an adopted child and her adoptive parents will inherit from and through each other, and the adopted

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123. VT. STAT. ANN. tit. 14, § 558.

124. *Id.* The Uniform Probate Code limits the application of its anti-lapse provision to the same persons who take in intestacy plus the testator's step-children and, in the case of a testamentary power of appointment, the testator's (donee's) or donor's grandparents and their descendants. UNIF. PROBATE CODE § 2-603, 8 U.L.A. 164.

125. VT. STAT. ANN. tit. 14, § 552; UNIF. PROBATE CODE § 2-107, 8 U.L.A. 87.

child and her natural parents will not inherit from or through each other.<sup>126</sup> The adoption by a step-parent, however, does not alter the ability of the adopted child to inherit from or through her former parent.<sup>127</sup>

In Vermont, a child may always inherit from and through her mother, but she may only inherit from and through her father if her parents are married, her father has been declared the putative father under 15 Vt. Stat. Ann. § 306, or her father has openly and notoriously claimed her as his own.<sup>128</sup> UPC § 2-114(a) allows a child to inherit from her parents regardless of marital status, and it provides that the parent-child relationship is established under existing state law. Enactment of the UPC in Vermont would not, therefore, change this provision unless Vermont were to adopt the Uniform Parentage Act at the same time.

Although the UPC incorporates other uniform acts, such as the Uniform Simultaneous Death Act<sup>129</sup> and the Uniform Statutory Rule Against Perpetuities,<sup>130</sup> it does not include the Uniform Parentage Act. Under the Uniform Parentage Act,<sup>131</sup> a man is the father of a child if (1) there is an un rebutted presumption of paternity,<sup>132</sup> (2) there has been an acknowledgment of paternity by the man, (3) there has been an adjudication of parentage, (4) the man has adopted the child, or (5) the man consented to assisted reproduction with the mother.

Both Vermont and the UPC reverse the common law presumption of an advancement where the decedent has made a lifetime transfer to an heir. In Vermont, a lifetime transfer of property is considered an advancement only if (1) the decedent designates it as an advancement in writing, (2) the heir acknowledges that it is an advancement in writing, (3) the decedent indicates in the gift or grant itself that it is an advancement, (4) the decedent indicates in the gift or grant that it is for love and affection rather than for pecuniary consideration,<sup>133</sup> or (5) the decedent delivers personal property to

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126. VT. STAT. ANN. tit. 15A, §§ 1-104 to 1-105 (2002); UNIF. PROBATE CODE § 2-114(b), 8 U.L.A. 91.

127. VT. STAT. ANN. tit. 15A, § 4-102; UNIF. PROBATE CODE § 2-114(b), 8 U.L.A. 91.

128. VT. STAT. ANN. tit. 14, § 553.

129. UNIF. PROBATE CODE § 2-702, 8 U.L.A. 182.

130. *Id.* § 2-901, 8 U.L.A. 226.

131. UNIF. PARENTAGE ACT § 201 (amended 2000), 9B U.L.A. 309 (2001).

132. The presumption of paternity arises if (1) the alleged father is married to the mother when the child is born, (2) he was married to the mother and the child is born within 300 days after the marriage terminates, (3) he thought he was married to the mother but the marriage was invalid and the child was either born during the invalid marriage or within 300 days after it terminates, (4) he marries the mother after the birth of the child and he voluntarily asserts his paternity of the child, or (5) he resided in the same household as the child during the first two years of the child's life and openly held out the child as his own. *Id.* § 204, 9B U.L.A. 311.

133. The statutory language regarding love and affection is confusing. Judicial opinions refer to it only in the context of distinguishing between a gratuitous transfer from a transfer for consideration.

the heir before two witnesses who are requested to take note that the transfer is an advancement.<sup>134</sup> UPC § 2-109 is similar to the Vermont statute by requiring that (1) the decedent indicate in a contemporaneous writing that the transfer is an advancement or to be taken into account in computing decedent's estate in intestacy or (2) the heir acknowledges in writing that the gift is an advancement or to be taken into account in computing decedent's estate.<sup>135</sup>

One final issue is whether an heir must survive the decedent by any specified amount of time to be entitled to share in the decedent's estate. The UPC differs from existing Vermont law by requiring that an heir survive the decedent by 120 hours in order to inherit.<sup>136</sup> The 120 hour provision is similar to clauses frequently found in wills providing for distribution in cases of simultaneous death or death from a common disaster.<sup>137</sup> The purpose of the survivorship requirement is to prevent multiple probate proceedings in a short period of time for the same property and to prevent the distribution of property to individuals not desired by the decedent.<sup>138</sup> Although Vermont has adopted the Uniform Simultaneous Death Act,<sup>139</sup> it has not amended that act to require survival for any specified period of time.

#### D. Conclusion

The fundamental premise of the intestacy provisions is to distribute the decedent's property in the manner that the decedent would have wanted. The existing Vermont intestacy provisions do not accord with the average decedent's probable intent. Studies indicate that most individuals assume that their surviving spouse will inherit most, if not all, of the property.<sup>140</sup> As a couple's wealth increases, this assumption moderates.<sup>141</sup> Likewise, in

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*See, e.g.,* Heirs of Adams v. Adams, 22 Vt. 50, 64 (1849) (holding that "a deed expressed to be for a pecuniary consideration, cannot be made an advancement, by simply showing, that it was in fact executed upon the consideration of love and affection."); Newell v. Newell, 13 Vt. 24, 31-32 (1841) (noting that a presumption existed that the land was sold for monetary consideration since the deeds themselves referenced consideration of two thousand dollars). Neither the statute nor the judicial opinions provide any guidance for distinguishing an "advancement" from an inter vivos gift. Once again, language that had a clear meaning in the 19th century has lost that clarity in the 21st century.

134. VT. STAT. ANN. tit. 14, § 1723.

135. UNIF. PROBATE CODE § 2-109, 8 U.L.A. 88.

136. *Id.* § 2-104, 8 U.L.A. 84.

137. *Id.* § 2-104 cmt., 8 U.L.A. 84.

138. *Id.*

139. VT. STAT. ANN. tit. 14, §§ 621-627.

140. *See* Fellows, *An Empirical Study*, *supra* note 19, at 725-30 (indicating that "[m]ost respondents favored leaving their entire estate to their spouse and nothing to either parent").

141. *Id.*

second or subsequent marriages, the parties usually want to ensure that any children of the first relationship will inherit in addition to their spouse.<sup>142</sup>

The Vermont intestacy provisions do not meet these expectations. Instead, they continue to reflect feudal principles, where the primary source of wealth was the land and the surviving spouse was only entitled to a one-third share.<sup>143</sup> They do not accord with the realities of the 21st century where the source of an individual's wealth is more likely to be personal property, where marriage is viewed as an economic partnership with both parties having equal rights, and where divorce and remarriage have created multiple families. The UPC, on the other hand, tries to accommodate these new realities and meet the expectations of the modern decedent. As a result, its intestacy provisions more likely reflect the average decedent's probable intent than do the current Vermont statutes.

Another reason to prefer the UPC is the lack of clarity and guidance in existing Vermont law. The statutes are confusing. There are few cases interpreting the statutes, and many of the existing cases were decided in the 19th century. The UPC provides a comprehensive set of rules that were designed for current norms and expectations. The statutory provisions are supplemented with extensive comments and judicial interpretations. This would be welcome guidance for Vermont judges and practitioners.

Section 551(2) is particularly troubling. If the decedent has *any* kindred, no matter how remotely related, those kindred will be entitled to approximately one-half of the decedent's property if the decedent dies intestate survived by a partner but no issue. The application of this section to the decedent's personal property is also unclear. This lack of clarity can produce inconsistent results in similar cases as probate judges can, in all good faith, apply this section in different ways.

### III. THE OMITTED SPOUSE AND CHILD

In most jurisdictions, the decedent may not disinherit her spouse either intentionally or by accident.<sup>144</sup> The law provides a remedy for a spouse who does not receive a specific share of the decedent's property from the will; he may file for his statutory share or, in some jurisdictions, claim as an omitted spouse. While a decedent may, in all jurisdictions except

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142. *Id.* at 732 (demonstrating that the most frequent response Illinois residents provided was that they wished to give half of their estate to their spouse and the remaining half of their estate to a child from a previous marriage).

143. Vermont is one of only a few jurisdictions that continues to follow this pattern. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.2 statutory note (1999).

144. Georgia is the only state without an elective share, dower or curtesy provision or community property. GA. CODE ANN. § 53-3-1 to § 53-3-5 (Michie 1997 & Supp. 2004).

Louisiana,<sup>145</sup> disinherit her children or other relatives, the law provides a safeguard for children who may be born after a will is executed or who may simply have been forgotten. These statutes reflect a public policy of protecting the surviving spouse and children and, thus, in many situations they thwart the decedent's clearly stated intent.

#### A. *The Elective Share*

At common law, a widow was entitled to dower, i.e., a life estate in one-third of her husband's real property.<sup>146</sup> The primary purpose of dower was to provide support for the widow. A widower, on the other hand, was entitled to curtesy, i.e., a life estate in all of his wife's real property, but only if they had lawful issue.<sup>147</sup> Most jurisdictions have abolished dower and curtesy in favor of a gender-neutral statutory elective share, but not Vermont.<sup>148</sup>

Although it has deleted the terms "dower" and "curtesy" from its statutes,<sup>149</sup> Vermont continues to distinguish between a *widow's* interest in her deceased husband's real estate and a *widower's* interest in his deceased wife's real estate.<sup>150</sup> The widow's interest is paid *before* unsecured creditors,<sup>151</sup> but the widower's interest is paid only *after* unsecured creditors.<sup>152</sup>

145. LA. CIV. CODE ANN. art. 1494 (West 2000). A decedent in Louisiana may disinherit a child for "just cause." *Id.*

146. BLACKSTONE, *supra* note 62, at 129; MCGOVERN & KURTZ, *supra* note 62, at 137.

147. BLACKSTONE, *supra* note 62, at 126; MCGOVERN & KURTZ, *supra* note 62, at 137.

148. In Vermont, the surviving spouse's elective share is essentially the same as the spouse's share in intestacy. The only difference is the surviving spouse's right to the entire estate of the decedent under § 551(2) in the absence of other kindred if the decedent dies intestate. See *supra* notes 60–65 and accompanying text. As a result, the analysis in this part also applies to Vermont's intestacy provisions.

149. 1896 Vt. Acts & Resolves 31. The 1896 revision to the predecessors of § 461 and § 474 refers to a one-third interest in real property rather than dower or curtesy. *Id.* §§ 1, 15. The revisions to the predecessor to § 551 in that same year, however, retain the reference to dower and curtesy. 1896 Vt. Acts & Resolves 37. The reference to dower and curtesy in the predecessor to § 551 did not disappear until 1912. 1912 Vt. Acts & Resolves 31–59.

150. Compare VT. STAT. ANN. tit. 14, §§ 461–472 (2002), with VT. STAT. ANN. tit. 14, §§ 474–475 (2002). See Hon. George K. Belcher, *Spousal Elections: A Primer*, 21 VT. B. J. & L. DIG., Apr. 1995, at 21 (explaining disparate treatment of widows versus widowers).

The proposal by the Vermont Probate Judges Association would specifically abolish dower and curtesy. See VT. PROBATE STUDY COMM., *supra* note 25. This indicates that the probate judges themselves are not entirely convinced that prior legislation has abolished dower and curtesy. The only other jurisdiction that continues to adhere to dower and curtesy is Arkansas. ARK. CODE ANN. § 28-9-214 (Michie 1987).

151. *Blanchard v. Blanchard's Estate*, 109 Vt. 454, 461, 199 A. 233, 236 (1938).

152. *In re Bidwood's Estate*, 86 Vt. 295, 295, 85 A. 6, 6 (1912); *Bennett v. Camp*, 54 Vt. 36, 40–41 (1882).



These distinctions cannot simply be ignored or interpreted in a gender-neutral manner. In 1839, Vermont adopted a general statutory provision that provides:

Every word, importing the singular number, only, may extend and be applied to several persons or things, as well as to one person or thing; and every word, importing the plural number only, may extend and be applied to one person or thing, as well as to several persons or things; and every word, importing the masculine gender only, may extend and be applied to females as to males.<sup>153</sup>

While this section directs that the singular can be plural and the plural can be singular, it does not create a similar two-way interpretation for gender. Instead, it includes the feminine in the masculine but does not provide that the feminine can include the masculine. Even if § 175 did so, it would be impossible to ignore the different explicit statutory provisions in chapter 43 of title 14 governing a widow's interest and a widower's interest that have been reaffirmed by the Vermont Legislature on numerous occasions after § 175 was adopted.

Regardless of gender, the surviving spouse who elects against the will is entitled to the same allowances—for the homestead, exempt property, and family support—as in intestacy in both Vermont and under the UPC.<sup>154</sup> These allowances are generally paid before any unsecured creditors of the estate.<sup>155</sup>

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153. THE REVISED STATUTES OF THE STATE OF VERMONT: PASSED NOVEMBER 19, 1839 52 (Chauncey Goodrich ed., 1840).

154. See *supra* notes 68–71 and accompanying text. The amounts vary, but the allowances are basically the same.

155. UNIF. PROBATE CODE § 2-204 (amended 1990), 8 U.L.A. 104 (1998), defines the “net probate estate” as the decedent’s probate property reduced by funeral and administrative expenses as well as the homestead allowance, the family allowance, the exempt property allowance, and enforceable claims. See also *id.* § 2-402 (stating that the “homestead allowance . . . has priority over all claims against the estate”); § 2-403 (noting that the exempt property allowance has “priority over all claims against the estate” except the homestead allowance and family allowance), 2-404 (stating that the “family allowance . . . has priority over all claims except the homestead allowance”).

In Vermont, the homestead allowance is paid before unsecured creditors. VT. STAT. ANN. tit. 27, §§ 101, 105, 107 (1998). The widow’s one-third interest in real property is also paid *before* unsecured debts. VT. STAT. ANN. tit. 14, § 461 (2002); see also *Blanchard*, 109 Vt. at 461, 199 A. at 236 (concluding that “[a] careful consideration of the various sections of the statutes to which we have referred compels the conclusion that the widow’s interest in lieu of dower under our present law is preferred over the claims of unsecured creditors”). If the surviving spouse is a widower, his share of the real property is paid *after* unsecured creditors. *In re Bidwood’s Estate*, 86 Vt. 295, 85 A. 6; *Bennett*, 54 Vt. at 40–41. Two of the three possible family allowances are also paid before debts, VT. STAT. ANN. tit. 14, §§ 404, 405. The family allowance is paid only after payment of debts. *Id.* § 406. The surviving spouse’s interest in personal property is also paid only after the unsecured debts. *Id.* § 401. If there are

In addition to these allowances, a surviving spouse in Vermont may file for a statutory share if he or she is omitted from the will or if he or she is not satisfied with the provision made for him or her in the will. If the surviving spouse waives the provisions of the decedent's will, he or she will first receive a one-third interest in the decedent's personal property<sup>156</sup> and an interest in the decedent's real property.<sup>157</sup> In contrast to the common law, the survivor is entitled to a fee interest, not a life estate. Similar to the common law, however, a widow's interest is distributed before unsecured creditors but a widower's interest is distributed only after the payment of unsecured creditors.<sup>158</sup>

As in intestacy, if the decedent had two or more issue, the surviving spouse is entitled to only one-third of the real estate. If the decedent had only one issue, the surviving spouse is entitled to one-half.<sup>159</sup> If the decedent has no surviving issue and the survivor waives the right to the real property as designated in § 461 and § 474, the survivor is entitled to \$25,000 and one-half the remainder under § 551(2). Under § 551(2), however, unsecured creditors are paid first. And, unlike intestacy, the surviving spouse is not entitled to the entire estate if there are no kindred.<sup>160</sup> Because the surviving spouse is taking in opposition to the decedent's expressed intent in the will, the spouse's rights are more limited than in intestacy. To hold otherwise would be to eliminate a decedent's right to devise her property whenever she had no surviving issue.<sup>161</sup>

On the other hand, the language of § 551(2) would appear to preclude its application to a spousal election against the will. The introductory language states that the section applies to "[t]he real and personal estate of a decedent, *not devised nor bequeathed* and not otherwise appropriated and distributed in pursuance of law."<sup>162</sup> In *In re O'Rourke's Estate*, the Vermont Supreme Court interpreted similar language in § 461, i.e., "not lawfully disposed of by the decedent's last will," holding that such language did not defeat a surviving spouse's election.<sup>163</sup> The court explained that a decedent could not *lawfully* dispose of property to deprive

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no surviving issue and the spouse waives dower under § 461 and takes the share designated in § 551(2), that share is also paid after unsecured debts. See Belcher, *supra* note 50, at 21 (stating that "homestead, dower and spousal maintenance are awarded free of unsecured debts of the estate").

156. VT. STAT. ANN. tit. 14, §§ 401, 402.

157. A widow's interest is governed by § 461, while a widower's interest is governed by § 474. *Id.* §§ 461, 474.

158. See *supra* notes 148–153 and accompanying text.

159. VT. STAT. ANN. tit. 14, §§ 461, 474; see *supra* note 77 and accompanying text.

160. *In re Estate of Copeland*, 123 Vt. 32, 36, 179 A.2d 475, 478–79 (1962).

161. *Id.*

162. VT. STAT. ANN. tit. 14, § 551 (emphasis added).

163. *In re O'Rourke's Estate*, 106 Vt. 327, 333, 175 A. 24, 26 (1934).

the surviving spouse of her statutory share.<sup>164</sup> In seeking the meaning of this phrase, the court turned to the origins of the provision.

By the ancient common law, a dead man's personal estate was divided into three equal parts. Of these, one went to his heirs or lineal descendants; one went to his wife; and the third went according to his will. If he left no wife, two parts were at his disposal. If he left no children, the same result followed. If he left neither wife nor children, he could will the whole as he pleased. The shares that went to the wife and children were known to the law as their "reasonable parts," and her share became part and parcel of her "thirds." Such was the law of England for a great many years. But it was modified by statute and custom until it finally became the law, and this was long before we adopted the common law, that a man might dispose of all of his personal property by will. 2 Black. Com. 491 et seq. Our earliest statutes on the subject followed this modified common law, and limited the right of the widow to participate in the personal property of her deceased husband to such as was not bequeathed to others. St. 1788, p. 53; St. 1797, p. 224; St. 1808, p. 132. This continued to be the law of this jurisdiction until the passage of the Probate Act of 1821, section 70 (Laws 1924, p. 347) of which provided that the widow "of any deceased person" should have at least one-third of the personal estate. This, obviously, was a return to the ancient common law, for it applied to all estates, testate and intestate, and gave the widow an absolute right, will or no will.<sup>165</sup>

The court followed this interpretation in applying § 551(2) to the surviving spouse in *In re Estate of Copeland*, allowing the surviving spouse to take stated statutory amount plus one-half of the estate despite the fact that the decedent had left his entire estate in trust for her.<sup>166</sup>

The right to claim a statutory share is personal to the surviving spouse; if he dies before making the election, it cannot be made on his behalf.<sup>167</sup> The surviving spouse is entitled to elect against the will even when the decedent has given the spouse a life estate in most, or all, of his property.

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164. *Id.*

165. *Id.* at 330, 175 A.2d at 24; *see also* VT. R. PROB. P. 13, which lists the right to waive the will and take the share specified under VT. STAT. ANN. tit. 14§ 551(2).

166. *In re Estate of Copeland*, 123 Vt. at 34–36, 179 A.2d at 477–79. The court did not discuss the nature of the decedent's property, i.e., whether it was real property, personal property, or both. It simply applied § 551(2) to the totality of the decedent's estate. This suggests that a surviving spouse may be required to waive the § 401 share. *See supra* notes 80–88 and accompanying text.

167. *In re Estate of Davis*, 129 Vt. 162, 167, 274 A.2d 491, 494 (1971).

In this situation, the surviving spouse is allowed to waive the will and take the statutory share in fee.<sup>168</sup>

In Vermont, the spouse is only entitled to elect against the decedent's probate property. Nonprobate transfers, such as life insurance, annuities, joint tenancy, and revocable trusts are beyond the reach of the elective share as long as they are not fraudulent transfers designed to defeat the surviving spouse's interest.<sup>169</sup> Other jurisdictions allow the surviving spouse to claim a share of these non-probate transfers, particularly revocable trusts, under a variety of theories.<sup>170</sup> The Vermont Supreme Court has not yet faced this issue, and it is uncertain what it would decide.

The Vermont provisions, grounded as they are in principles of feudalism, are designed to *protect* the surviving spouse following the decedent's death.<sup>171</sup> Although the Vermont Supreme Court does not specifically say so, the implication is that the decedent was the primary wage earner and that the surviving spouse needs to receive a portion of decedent's property for support.

The UPC, on the other hand, explicitly promotes both the duty to support and the partnership theories of marriage.<sup>172</sup> In keeping with the partnership theory, the UPC bases the amount of the surviving spouse's share on the length of marriage. For example, if the marriage lasted for 15 years or more, the surviving spouse receives 50% of the augmented estate. If the marriage lasted for more than one but less than two years, the

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168. *In re Estate of Copeland*, 123 Vt. at 34–36, 179 A.2d at 477–79; *In re Peck's Estate*, 80 Vt. 469, 477, 68 A. 433, 434 (1908).

169. While some probate experts in Vermont may believe that assets held in a revocable trust would be subject to the surviving spouse's elective share, others do not. There are neither statutes nor judicial opinions answering this question. The only way to subject assets, such as a revocable trust, to the spouse's elective share would be to invoke § 473, i.e., to prove that the transfer was a fraudulent conveyance specifically designed to defeat the surviving spouse's elective share. VT. STAT. ANN. tit. 14, § 473.

170. *See, e.g., In re Estate of Defilippis*, 683 N.E.2d 453, 458, 460 (Ill. App. Ct. 1997) (adopting a present donative intent test); *In re Estate of Froman*, 803 S.W.2d 176, 179, 181 (Mo. Ct. App. 1991) (adopting an intent to defraud test); *Hanke v. Hanke*, 459 A.2d 246, 248 (N.H. 1983) (following the intent to defraud test); *Newman v. Dore*, 9 N.E.2d 966, 968–69 (N.Y. 1937) (holding that the creation of a revocable trust was an illusory transfer, making that trust subject to the surviving spouse's elective share); *Pezza v. Pezza*, 690 A.2d 345, 350 (R.I. 1997) (adopting the illusory transfer test).

Some jurisdictions have adopted statutory schemes to include non-probate transfers. *See, e.g., DEL. CODE ANN. tit. 12, § 902* (2001) (defining the elective estate); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (McKinney 1998) (providing that nonprobate property, such as property held in joint tenancy, shall be included in the estate for calculation of the surviving spouse's elective share).

171. *See, e.g., In re Estate of Davis*, 129 Vt. at 166–67, 274 A.2d at 494; *In re O'Rourke's Estate*, 106 Vt. 327, 331 175 A. 24, 25–26 (1934) (explaining that the right of dower is designed to "safeguard the interests of the wife . . . and deservers the high favor of the law").

172. UNIF. PROBATE CODE art. II, pt. 2, general cmt. (amended 1990), 8 U.L.A. 93 (1998).

surviving spouse receives only 3% of the augmented estate.<sup>173</sup> Moreover, the UPC includes both the decedent's probate and non-probate transfers as well as the surviving spouse's property and non-probate transfers in the calculation of the spouse's elective share.<sup>174</sup>

The UPC elective share is assessed against the augmented estate.<sup>175</sup> The augmented estate includes not only the decedent's net probate estate,<sup>176</sup> but also the decedent's non-probate transfers to others. This includes: property over which the decedent held a presently exercisable general power of appointment, such as a revocable inter vivos trust;<sup>177</sup> the decedent's fractional interest in property held in joint tenancy with the right of survivorship with someone other than the surviving spouse; decedent's interest in accounts held in POD, termination on death (TOD), or co-ownership registration with the right of survivorship; and proceeds of life insurance.<sup>178</sup> The augmented estate also includes property transferred during marriage where the decedent retained the right to possession, enjoyment, or income from the property or a power over the property exercisable for the benefit of the decedent, her creditors, or her estate.<sup>179</sup> It also includes certain property given away during marriage and within two years of death.<sup>180</sup> The augmented estate also includes the decedent's non-probate transfers to the surviving spouse,<sup>181</sup> as well as the surviving spouse's own property and non-probate transfers to others.<sup>182</sup>

As in Vermont, the elective share under the UPC is personal to the surviving spouse, but it may be exercised on his behalf by a conservator, guardian, or agent.<sup>183</sup> Although UPC § 2-209 provides that the surviving spouse's elective share is satisfied first by the amount of any probate and non-probate transfers from the decedent,<sup>184</sup> the surviving spouse need not

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173. *Id.* § 2-202, 8 U.L.A. 102.

174. *Id.* §§ 2-203 to 2-207, 8 U.L.A. 102-05, 115-16, 118.

175. *Id.* §§ 2-202 to 2-203, 8 U.L.A. 102-04.

176. The net probate estate is the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims. *Id.* § 2-204, 8 U.L.A. 104. It does not distinguish between real and personal property as Vermont does. Moreover, all the property is subject to creditors' claims whereas in Vermont, the widow's share under § 461 is not subject to these claims. *Blanchard v. Blanchard's Estate*, 109 Vt. 454, 461, 199 A. 233, 236 (1938).

177. UNIF. PROBATE CODE § 2-205(1)(i), 8 U.L.A. 105.

178. *Id.* § 2-205(1)(ii)-(iv), 8 U.L.A. 102.

179. *Id.* § 2-205(2), 8 U.L.A. 105-06.

180. *Id.* § 2-205(3), 8 U.L.A. 106.

181. *Id.* § 2-206, 8 U.L.A. 115-16.

182. *Id.* §§ 2-206 to 2-207, 8 U.L.A. 115-16, 118.

183. *Id.* § 2-212, 8 U.L.A. 126-27.

184. *Id.* § 2-209(a)(1), 8 U.L.A. 222-23.

accept a life estate in the decedent's will.<sup>185</sup> Both Vermont<sup>186</sup> and the UPC<sup>187</sup> recognize that the surviving spouse can waive his rights to the elective share in a valid ante-nuptial agreement.

The following examples demonstrate the basic differences between the approach taken by Vermont and that taken by the UPC. Assume that (1) Decedent and Spouse have been married for thirty years; (2) they have two children; and (3) Decedent owns the following property—the family home valued at \$375,000, investment real estate valued at \$600,000, household goods, a car, and bank accounts worth \$60,000, and stocks valued at \$300,000. Decedent's total probate estate is worth \$1,335,000. Further assume that Decedent bequeathed all her property to their two children. In Vermont, Spouse would receive a homestead allowance of \$75,000, one-third of the remaining real estate, i.e., \$300,000, and one-third of the personal property, i.e., \$120,000, for a total of \$495,000. Under the UPC, by contrast, Spouse would receive a homestead allowance of \$15,000, exempt property of \$10,000, and one-half the balance, i.e., \$655,000 for a total of \$680,000. If the homestead allowance was \$75,000, as it currently is in Vermont, the Spouse's share would increase to \$740,000.

Now assume that Spouse has \$690,000 of property in his name alone. The result in Vermont remains the same; the Spouse's share is not affected by the extent of his own property. Under the UPC, that \$690,000 would be included in the augmented estate. Spouse's elective share would increase to \$1,000,000. This would be satisfied first with Spouse's own property, leaving \$310,000 to be distributed to Spouse from Decedent's estate.

If Spouse has \$1,500,000 of property, the augmented estate increases to \$1,810,000 and Spouse's share to \$905,000. In this case, Spouse is entitled to none of Decedent's property because Spouse already has more than half of the amount in the augmented estate. In Vermont, Spouse would still receive \$495,000.

Returning to the original hypothetical, assume that Decedent and Spouse have been married only for one year and a day and that Decedent has two children from a prior marriage to whom Decedent bequeaths all her property. In Vermont, Spouse is still entitled to the \$75,000 homestead allowance, the \$300,000 in real property, and the \$120,000 in personal property. Under the UPC, on the other hand, Spouse is only entitled to 3%

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185. *Id.* § 2-209 cmt., 8 U.L.A. 123–24.

186. *Chaffee v. Chaffee*, 70 Vt. 231, 237, 40 A. 247, 248 (1897); *Little v. Dwinell*, 57 Vt. 301 (1884); *see also* *Stalb v. Stalb*, 168 Vt. 235, 241 719 A.2d 421, 426 (1998) (holding that a contract valid under New York law will be upheld in Vermont) (citing *Rogers v. Rogers*, 135 Vt. 111, 112, 373 A.2d 507, 509 (1977)).

187. UNIF. PROBATE CODE § 2-213, 8 U.L.A. 129–30.

of the augmented estate or \$39,300<sup>188</sup> in addition to the homestead allowance of \$15,000 and the exempt property allowance of \$10,000.

Changing the facts again, assume that Decedent and Spouse were married thirty years and had two children. They owned the family home in joint tenancy with the right of survivorship. Decedent owned \$60,000 in household goods, a car, and bank accounts. Decedent transferred the \$600,000 of investment real estate and \$300,000 of stocks into a revocable trust to pay the income to Decedent during her life and, at her death, to distribute the trust property to her children in equal shares. Decedent's will leaves all her probate property to Spouse. Because the UPC includes the revocable trust in the augmented estate, the result is the same as the original hypothetical, i.e., Spouse is entitled to a total of \$680,000. In Vermont, Spouse would be entitled to the house because it is held in joint tenancy with the right of survivorship. There is no point in electing against the will because the Spouse is entitled to all the property under the will. The revocable trust is not subject to the elective share, and the \$900,000 of investments would pass to the decedent's children.

It is possible that the Vermont Supreme Court would hold that a revocable trust is subject to the spouse's elective share, following the reasoning of the Massachusetts Supreme Judicial Court in *Sullivan v. Burkin*.<sup>189</sup> In that case, the Massachusetts court declined to adopt the illusory transfer test or the intent to defraud test,<sup>190</sup> but simply declared that all revocable trusts would be subject to the elective share for public policy reasons.<sup>191</sup> The court made its ruling prospective only, applying it to trusts created or amended after the date of the opinion.<sup>192</sup>

It is also possible that the Vermont Supreme Court might invoke § 473 to subject a revocable trust, or other non-probate transfer, to a spouse's elective share. This provision, however, is of limited utility in most cases. First, the survivor must prove that the conveyance by the decedent was "made with intent to defeat . . . her claim."<sup>193</sup> Second, this provision only applies to real property and not to personal property such as stocks, bonds, or even cash.<sup>194</sup> Third, it applies only to conveyances by a *husband*.<sup>195</sup>

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188. In this situation, the spouse would instead be entitled to the supplemental elective share amount of \$50,000. *Id.* § 2-202(b), 8 U.L.A. 102.

189. *Sullivan v. Burkin*, 460 N.E.2d 572 (Mass. 1984).

190. *Id.* at 577.

191. *Id.*

192. *Id.*

193. VT. STAT. ANN. tit. 14, § 473 (2002).

194. *Id.*

195. *Id.*

While most of Vermont's statutes are gender neutral,<sup>196</sup> the provisions of title 14, chapter 43, governing the surviving spouse's rights to real property in intestacy or pursuant to an election against the will are not. Because there are separate and distinct provisions governing a widow's interest and a widower's interest,<sup>197</sup> it is not simply a matter of interpreting language in a gender-neutral manner. The court would first have to decide which set of provisions to apply and then it would have to pretend that the other set of provisions did not exist. While the court might be willing to act in the absence of legislative guidance, it will usually not do so in the face of explicit legislative provisions.

The gender distinction in Vermont's intestacy and elective share provisions presents a problem for same-sex couples in civil unions. These provisions apply to the surviving partner.<sup>198</sup> It is unclear whether the gender of the decedent or the gender of the survivor would determine which sections applied.

The UPC provisions implement a partnership theory of marriage and, thus, more closely reflect both economic reality and the expectations of the modern couple. If divorce separated Decedent and Spouse rather than death, Spouse would, in most cases, receive one-half of the property acquired during the marriage rather than one-third. Moreover, all the assets would be considered in the divorce context, not just the assets of the petitioner (or respondent). The UPC adopts a similar scheme at death. It includes property owned by both spouses as well as their non-probate transfers to others and the decedent's non-probate transfers to the surviving spouse. This augmented estate promotes both the support theory and the partnership theory. By considering all assets of both spouses, the UPC ensures that the survivor in fact receives his "fair share" of the marital or partnership assets. No more. No less.

The Vermont elective share provisions, on the other hand, take no notice of the survivor's property or the decedent's non-probate transfers. As a result, the survivor may receive far more than his fair share, (if, for example, he has significant property of his own) or far less (if, for example, the decedent had significant non-probate assets). Because of this, the surviving spouse may receive property that is not necessary for his continued support (e.g., if he has substantial property of his own) or he may not receive enough (e.g., if the decedent had significant non-probate assets).

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196. VT. STAT. ANN. tit. 1, § 175 (2003).

197. Compare VT. STAT. ANN. tit. 14, § 461 (governing the widow's interest), with § 474 (describing the husband's interest in lieu of curtesy).

198. See *supra* note 1 (providing same-sex couples the same survivorship rights as heterosexual couples).



The sliding scale in UPC § 2-202 also promotes the partnership theory by giving 50% of the augmented estate to the survivor of a long term marriage (fifteen years or more) but only 3% to the survivor of a marriage that lasted only one year. Although not a perfect reflection of each spouse's contributions to the partnership of marriage, the sliding scale does a far better job than assigning the survivor a flat one-third share.<sup>199</sup> Vermont, by contrast, awards the same amount to the surviving spouse whether the couple has been married for two years or thirty years.

Today many decedents own life insurance, joint tenancy property, and other non-probate assets. In fact, for many decedents these non-probate assets form their basic estate plan. Recognizing this reality, the UPC includes these assets in the augmented estate without the surviving spouse needing to prove that the transfers were fraudulent<sup>200</sup> and allows the surviving spouse to file for the elective share even where the decedent dies intestate. In the last example described above where the decedent transferred the investment assets to a revocable trust, Spouse could file for an elective share under the UPC whether or not Decedent had a will. The intestacy provision, § 2-102, would give Spouse all of the probate property but would not include the revocable trust. The elective share, however, would give Spouse 50% of the augmented estate, which would include the revocable trust.

### B. The Omitted Spouse

In Vermont, the elective share provisions discussed in the prior section apply whether the decedent omits the surviving spouse from her will either intentionally or inadvertently and whether the will was executed before or after the marriage. In most cases, the survivor receives the same property he would have received had the decedent died intestate.<sup>201</sup> Under the UPC, a spouse who is omitted from the decedent's will may have another option. Section 2-301 applies where the decedent has a will, but that will was executed before the decedent married the surviving spouse. The law does not automatically revoke the existing will when the decedent marries.<sup>202</sup> If

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199. In Vermont, the surviving spouse will receive a one-half share of the remainder if the decedent had no issue. VT. STAT. ANN. tit. 14, § 551(2). Even in these cases, the share does not necessarily reflect the survivor's contribution if the marriage was of short duration or the decedent had made significant non-probate transfers to others.

200. *Compare id.* § 473, with UNIF. PROBATE CODE § 2-202 (amended 1990), 8 U.L.A. 102 (1998).

201. If the decedent has no kindred, the surviving spouse would receive 100% in intestacy but only \$25,000 plus half the remainder under the elective share. VT. STAT. ANN. tit. 14, § 551(2).

202. UNIF. PROBATE CODE § 2-804(f), 8 U.L.A. 217-18; *see Morton v. Onion*, 45 Vt. 145, 151-

the decedent fails to revoke the pre-existing will or execute a new one, the surviving spouse may claim his share either as an omitted spouse under § 2-301 or under the elective share in § 2-201.<sup>203</sup>

Under UPC § 2-301 the surviving spouse receives the same share he would have received had the decedent died intestate. The section, however, limits the property against which that share will be assessed to the property that is not bequeathed to the decedent's child or children who are not the survivor's children. The section also does not apply if (1) it appears that the will was made in contemplation of the decedent's marriage to the surviving spouse; (2) the will expresses the intention that it be effective notwithstanding any subsequent marriage; or (3) the decedent provided for the spouse outside the will.

Because of these restrictions, the omitted spouse provision will apply only in a very limited number of cases. First, the decedent must have a will that was executed before the marriage. Second, the will must not have been made in contemplation of marriage or it must express the intention that it be effective despite the marriage. Third, there must be no ante-nuptial agreement or other provision for the surviving spouse outside the will. And fourth, the property must not be left to the decedent's children from a prior relationship.<sup>204</sup>

In the few cases where the section does apply, however, the omitted spouse provision gives the surviving spouse the option to take his intestate share. As indicated above, this would be at least 50% and as much as 100%.<sup>205</sup> The provision only applies to the decedent's probate property. On the other hand, distribution under this provision ignores the surviving spouse's property so this option may be preferable if the surviving spouse has significant property of his or her own.

The operation of § 2-301 is illustrated in the following examples. Assume that A and B are married, that A has a will that was executed five years before the marriage that bequeaths her property to her siblings in equal shares, that A and B were married for 16 years, that A has no issue, and that when A dies, A is survived by B and three siblings.<sup>206</sup> In the first

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52 (1872) ("Admitting that by the English law the will of a [widow] is generally revoked by marriage, that rule does not apply in Vermont.").

203. Many jurisdictions that have not adopted the Uniform Probate Code also provide the omitted spouse with an intestate share. *E.g.*, CAL. PROB. CODE § 21610 (West 1991 & Supp. 2004); CONN. GEN. STAT. ANN. § 45a-257a (West. 2004); DEL. CODE ANN. tit. 12, § 901 (2001); FLA. STAT. ANN. § 732.301 (West 1995); MISS. CODE ANN. § 91-5-27 (1994); MO. ANN. STAT. § 474.235 (West 1992); N.Y. EST. POWERS & TRUSTS LAW § 5-1.3 (McKinney 1998); R.I. GEN. LAWS § 33-5-9 (1995).

204. UNIF. PROBATE CODE § 2-301, 8 U.L.A. 133.

205. *See supra* notes 95–100 and accompanying text.

206. These examples will ignore the homestead, exempt property, and family allowances in sections 2-402, 2-403, and 2-404 because those allowances would be the same whether B filed for his

situation, assume that A owned \$500,000 of property that is subject to probate and that B owned no property of his own. In this situation B has two options. B could elect against the will under § 2-201. The augmented estate would consist of A's \$500,000 of property, and B would be entitled to 50% or \$250,000. Because the will was executed before the marriage and none of the exceptions apply, B also has the choice of claiming as an omitted spouse under § 2-301. If B did so, B would receive his intestate share which, in this case, would be 100% or \$500,000.<sup>207</sup> Under these circumstances, one would expect that most surviving spouses would choose this alternative.

Now assume that A has transferred that \$500,000 to a revocable trust at the same time A executed her will. If B claimed as an omitted spouse under § 2-301, B would receive nothing because A's property is not subject to probate. On the other hand, if B filed for his elective share, he would receive \$250,000 because § 2-205(1)(i) includes property over which the decedent had a presently exercisable power of appointment, such as property held in a revocable trust, in the augmented estate.

B would also choose to claim his elective share under § 2-201 if A had children from a prior relationship and had left the \$500,000 to those children.<sup>208</sup> In this situation, B would receive nothing under § 2-301 because A left the property to those children.

Now assume that A had no children and that A owned \$250,000 of probate property and \$250,000 of property held in a revocable trust. In this situation, if B claimed as an omitted spouse, B would receive 100% of the probate property or \$250,000. If B claimed his elective share, he would also receive \$250,000. Only if A owned more than half of her property as probate property would it make sense for B to claim as an omitted spouse.

Now assume that B also owns property of his own. If B owns minimal property, his choices will look much like the hypotheticals already described. If B owns significant property, the better choice would be to claim as an omitted spouse because B's property is included in the augmented estate.<sup>209</sup> For example, assume that A owns \$500,000 of probate property and B owns \$100,000 of probate property. If B claims as an omitted spouse, B will receive A's \$500,000. If B files for his elective share, B would receive \$200,000 from A's estate.<sup>210</sup> On the other hand, if

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elective share or claimed as an omitted spouse.

207. UNIF. PROBATE CODE § 2-102, 8 U.L.A. 81.

208. *Id.* § 2-301(a), 8 U.L.A. 133.

209. *Id.* § 2-207, 8 U.L.A. 118.

210. The augmented estate includes both A's and B's property, i.e., \$600,000. *Id.* §§ 2-204, 2-207, 8 U.L.A. 104, 118. B would be entitled to one-half, i.e., \$300,000. *Id.* § 2-202, 8 U.L.A. 102. This share would be satisfied first with B's own property, i.e., \$100,000, leaving \$200,000 to come from A's

B owned \$500,000 of property in his name, then B would receive A's \$500,000 if B filed as an omitted spouse and nothing if B filed for his elective share.<sup>211</sup>

In Vermont, the results would be far different. In the first situation, B would receive \$25,000 plus half the remainder under § 551(2), or \$262,500.<sup>212</sup> In the second situation, B would receive nothing because all of A's property is in the revocable trust. In the third situation, B would receive only one-third of A's property. In the fourth situation, B's share would decrease to \$137,500 because half of A's property is in the revocable trust. In the final situation, B would again receive \$262,500 because in Vermont, B's ownership of property is irrelevant.

Once again, the UPC provisions more accurately reflect the average decedent's expectations whether one subscribes to the support theory, the partnership theory, or both. In so doing, these provisions more clearly reflect the realities of modern life rather than our feudal roots.

### C. *The Omitted Child*

A similar problem arises when the decedent makes a will and a child is born after the will is executed. Unless the decedent bequeathed property to her children as "children" and not by name, the afterborn child will not share in the property. As with intestacy, the law attempts to distribute the property in the manner that the average testator would have intended and gives the afterborn child the same share that he would have received had the decedent died intestate. Both Vermont and the UPC contain virtually identical provisions.<sup>213</sup>

Vermont also has an additional statutory provision that gives the same intestate share to a child that is merely forgotten.<sup>214</sup> A "forgotten child" may be born either before or after the will was executed. As a result, the testator who wants to disinherit a child, or other issue, must do so explicitly in the will. The UPC provides for a "forgotten child" only if the decedent

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estate. *Id.* § 2-209, 8 U.L.A. 122.

211. In this situation, the augmented estate would be \$1,000,000. *Id.* §§ 2-204, 2-207, 8 U.L.A. 104, 118. B would be entitled to one-half, i.e., \$500,000. *Id.* § 2-202, 8 U.L.A. 102. This share would be satisfied first with B's own property, i.e., \$500,000, leaving nothing to come from A's estate. *Id.* § 2-209, 8 U.L.A. 122.

212. VT. STAT. ANN. tit. 14, § 551(2) (2002). B would also receive the homestead allowance under tit. 27, §§ 101, 105 (1998).

213. Compare VT. STAT. ANN. tit. 14, § 555 ("[S]uch child shall have the same share in the estate of the testator as if such testator had died intestate."), with UNIF. PROBATE CODE § 2-302, 8 U.L.A. 135 ("[A]n omitted after-born . . . child receives a share in the estate equal in value to that which the child would have received had the testator died intestate . . .").

214. VT. STAT. ANN. tit. 14, § 556.

has omitted the child under the mistaken belief that the child is dead.<sup>215</sup>

The UPC allows the decedent to disinherit a child in a “negative will.”<sup>216</sup> A negative will is a duly executed document that simply disinherits the child or issue. It need not have any substantive provision. Vermont has no similar statutory provision, and the question has never been addressed in the case law.

#### *D. Conclusion*

Unlike intestacy where the law attempts to approximate the average decedent’s probable intent, the elective share and omitted heir provisions ignore, and in many cases, thwart the decedent’s known and stated intent. The Vermont elective share provisions are identical to Vermont intestacy provisions with some limited exceptions. As such, they continue to promote the common law policy of providing support to the surviving spouse, but only in a very rudimentary way. Vermont’s elective share provisions are over-inclusive by giving property to a surviving spouse who has significant property of his own, perhaps even greater wealth than the decedent. In these situations, the surviving spouse has no need for the decedent’s property to provide support. The Vermont elective share provisions are also under-inclusive, providing a mere one-third or perhaps one-half of the decedent’s property, even to the neediest spouse. While the probate court in Vermont could allocate more than one-third of the decedent’s personal property under sections 401 and 402, a probate court should be reluctant to do so where the decedent has bequeathed that property to someone other than the surviving spouse. As with intestacy, these provisions ignore the realities of modern life and undermine the marital relationship by not treating the spouses as partners in a joint venture. Moreover, many decedents own property that is not subject to probate, such as joint tenancy property, life insurance, and revocable trust assets. These non-probate assets are beyond the reach of Vermont’s elective share provisions. Finally, Vermont unnecessarily continues a gender distinction with respect to a surviving spouse’s right to the decedent’s real property.

The UPC, on the other hand, adopts both the support and the partnership theories of marriage. It attempts to provide the surviving spouse with sufficient support as well as his fair share of the marital assets, regardless of how the property is titled. Moreover, the UPC encompasses the many non-probate forms of ownership that are typical of the average

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215. UNIF. PROBATE CODE § 2-302(c), 8 U.L.A. 136.

216. *Id.* § 1-201(b), 8 U.L.A. 79.

decedent in the twenty-first century. For these reasons, the UPC appears preferable to Vermont with respect to the spouse's elective share.

There is no clear preference when it comes to the question of an omitted spouse or child. Vermont, like the UPC, gives each an intestate share. The primary difference is that the intestate share for an omitted spouse under the UPC is likely to be far greater than the intestate share in Vermont.

#### IV. WILLS

What is a will? The UPC adopts a broad and all-encompassing definition. Section 1-201(56) states that *any* testamentary instrument that disposes of property, revises an existing will, revokes a will, appoints an executor, nominates a guardian, or simply disinherits someone is a will.<sup>217</sup> The UPC recognizes an unwitnessed document as a will as long as the material portions are in the decedent's handwriting, and the decedent signs the document.<sup>218</sup> The UPC even allows a typed document or writing to qualify as a will if there is evidence that the decedent intended that writing to be testamentary in nature as long as that evidence is clear and convincing.<sup>219</sup> This writing need not be witnessed, and it may not even need to be signed.<sup>220</sup>

Vermont has a more traditional, circumscribed view of what constitutes a will. A will may be handwritten or it may be typed, but it must be signed by the testator and by three competent witnesses who sign the will in the presence of the testator and each other.<sup>221</sup> It is not clear whether Vermont would give effect to a document that merely appointed an administrator or guardian or a document that served only to disinherit someone. Although Vermont recognizes oral wills in a few very special situations,<sup>222</sup> it does not recognize holographic wills.<sup>223</sup>

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217. *Id.* § 1-201(56), 8 U.L.A. 38.

218. *Id.* § 2-502(b), 8 U.L.A. 144–45.

219. *Id.* § 2-503, 8 U.L.A.146. Few states have adopted this provision, known as the dispensing power. It is explained in John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1 (1987).

220. See Langbein, *supra* note 219, at 23–26 (summarizing a number of cases validating unsigned wills).

221. VT. STAT. ANN. tit. 14, § 5 (2002).

222. Under VT. STAT. ANN. tit. 14, § 7, an individual serving in the military can make an oral will disposing of his wages and personal property. See *Gould v. Safford's Estate*, 39 Vt. 498, 509–10 (1866) (accepting the oral will of a soldier). In addition, under VT. STAT. ANN. tit. 14, § 6, any individual may make an oral will of personal property that does not exceed the value of \$200.00 if a memorandum is made by someone present when the will was uttered and within six days of decedent's statement. In addition, such a will must be presented for probate within six months of the testator's death. Sections 6 and 7 apply only in limited situations. *In re Estate of Cote*, 176 Vt. 293, 296, 848 A.2d 264,

## A. Execution

The doctrines of form and formalism are nowhere more apparent than in the requirements for due execution of wills. Vermont requires (1) a writing (2) that is signed by the testator or someone in the testator's presence who is directed to do so by the testator (3) that is attested and subscribed (4) by three or more competent witnesses (5) who are not beneficiaries under the will or, if they are, are also heirs of the testator.<sup>224</sup> The witnesses need to be aware that they are witnessing the decedent's will although the testator need not formally publish the will or inform the witnesses of the contents of the will.<sup>225</sup> Although the testator need not sign the will in the presence of the witnesses, the witnesses must sign in the presence of the testator and each other. That is, the testator and the witnesses must be in the "line of sight" of each other, i.e., able to see what the other is doing.<sup>226</sup>

Vermont is the only jurisdiction that requires three witnesses.<sup>227</sup> It is also one of a minority of jurisdictions that require that the witnesses be together and in the line of sight of each other and the testator when they sign the will.<sup>228</sup> The UPC abandons the "presence" test and only requires that each witness sign within a reasonable time after either witnessing the testator sign the will or having the testator acknowledge his signature on the document or that the document is his will.<sup>229</sup> Many jurisdictions have adopted this rule even though they have not adopted the UPC.<sup>230</sup>

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266 (2004).

223. *Cote*, 176 Vt. at 298–99, 848 A.2d at 269.

224. VT. STAT. ANN. tit. 14, § 5. If a witness is also a beneficiary and not an heir, the will is still valid but that beneficiary loses her bequest. *Id.* § 10; *see also infra* notes 259–262 and accompanying text.

225. *In re Clafin's Will*, 75 Vt. 19, 33, 52 A. 1051, 1053 (1902); *In re Clafin's Will*, 73 Vt. 129, 132, 50 A. 815, 816 (1901); *Dean v. Heirs of Dean*, 27 Vt. 746, 751 (1855).

226. *See, e.g., In re Clafin's Will*, 75 Vt. at 33, 52 A. at 1057; *In re Clafin's Will*, 73 Vt. at 133, 50 A. at 816; *Heirs of Blanchard v. Heirs of Blanchard*, 32 Vt. 62, 64 (1859) (concluding that if the witnesses "were in the same room and might have *seen* the attestation of one another, that is held to be an attestation in the presence of the testator and of one another") (emphasis added).

227. JEFFERY A. SCHOENBLUM, 2004 MULTISTATE GUIDE TO ESTATE PLANNING 1–77 (2004).

228. *See* W.W. Allen, Annotation, *What Constitutes the Presence of the Testator in the Witnessing of His Will*, 75 A.L.R. 2d 318, 329–30 (1961) (providing that the testator must see the attesting witnesses sign the instrument).

229. UNIF. PROBATE CODE § 2-502(a)(3) (amended 1990); 8 U.L.A. 144 (1998).

230. *E.g.,* ALA. CODE § 43-8-131 (1991 & Supp. 2004); KAN. PROB. CODE ANN. § 59-606 (West 1994 & Supp. 2003); MASS. ANN. LAWS ch. 191, § 1 (Law. Co-op. 1994); MO. ANN. STAT. § 474.320 (West 1992) (stating that the testator is not required to sign the will in the presence of witnesses); NEV. REV. STAT. ANN. 133.040 (Michie 2003); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(4) (McKinney 1998) (providing a thirty day period for witnesses to sign a will); OKLA. STAT. ANN. tit. 84, § 56 (West 1990); WASH. REV. CODE ANN. § 11.12.020 (West 1998).

Vermont does not recognize holographic wills. If the testator writes a will in her own handwriting, she must still sign that document and have it witnessed by three other people.<sup>231</sup> Vermont is currently the only jurisdiction that requires three witnesses for a will.<sup>232</sup> In Vermont, if a witness is also a beneficiary, the will is still valid but the beneficiary loses the bequest unless that witness is also the testator's heir, i.e., someone who would receive the decedent's property or part of it if the decedent died intestate.<sup>233</sup> If a witness's spouse is a beneficiary, the will is valid but the spouse loses the bequest.<sup>234</sup> The original purpose of such a provision was to ensure that the witness was able to testify about the execution of the will.<sup>235</sup> Because a beneficiary had an interest in the validity of the will, he was disqualified as a witness and so was his spouse.<sup>236</sup> The Statute of George II, however, changed this rule, allowing the beneficiary to testify but depriving him of the legacy or devise.<sup>237</sup> American jurisdictions, including Vermont, adopted the English law then in effect, including the Statute of George.<sup>238</sup>

The UPC eliminates most of these formalities. A will must be written and signed by the testator.<sup>239</sup> The UPC only requires that there be two witnesses who each sign within a reasonable time after witnessing (1) the testator sign the will, (2) the testator's acknowledgment that the document is her will, or (3) the testator's acknowledgment of her signature.<sup>240</sup> A witness need only be generally competent and will not lose a bequest even if a witness to the will.<sup>241</sup>

The UPC, unlike Vermont, recognizes holographic wills as long as the signature and material portions are in the testator's handwriting.<sup>242</sup> The testator's intent can be found in the handwritten portions, in printed portions of the will or will form, or even from extrinsic evidence.<sup>243</sup> UPC

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231. *In re Estate of Cote*, 176 Vt. 293, 298–99, 848 A.2d 264, 269 (2004).

232. SCHOENBLUM, *supra* note 227, at 1–77. The requirement of three or more witnesses was established in the English Statute of Frauds, 1677, 29 Car. II, c. 3 § v. See ATKINSON, *supra* note 39, at 308. Only the New England states retained this requirement and all but Vermont have now abandoned it. *Id.*

233. VT. STAT. ANN. tit. 14, § 10 (2002).

234. *Id.*

235. See ATKINSON, *supra* note 39, at 309 (noting that the English Statute of Frauds required “credible” witnesses that were competent to testify).

236. *Id.*

237. *Id.*

238. *Id.* at 310.

239. UNIF. PROBATE CODE § 2-502(a) (amended 1990), 8 U.L.A. 144 (1998).

240. *Id.* § 2-502(a)(3), 8 U.L.A. 144.

241. *Id.* § 2-505, 8 U.L.A. 150.

242. *Id.* § 2-502(b), 8 U.L.A. 144–45.

243. *Id.* § 2-502(c), 8 U.L.A. 144–45.



§ 2-503 also adopts the dispensing power, which allows any document to be probated as a will as long as there is clear and convincing evidence that it reflects the decedent's testamentary intent.<sup>244</sup>

As these provisions indicate, the primary focus of the UPC is on effectuating the testator's intent. The UPC is less concerned with formalism or with protecting the testator. Vermont, on the other hand, ignores documents that clearly state the testator's testamentary intention where the execution formalities are not strictly followed. For example, in *In re Estate of Cote*, the decedent had a duly executed will that satisfied all the formal requirements of title 14, section 5 of the Vermont Statutes Annotated.<sup>245</sup> Then decedent met someone whom he planned to marry. One day he sat down, wrote out a new will, and signed it. He gave this document to his fiancée's mother, telling her that he wanted his fiancée to be taken care of if he died. He asked her mother to sign as a witness. He then gave her the will as well as the key to his safety deposit box for safekeeping. He told her to give the will to his fiancée if anything happened to him. He died, and she complied. No one claimed that decedent lacked the requisite mental capacity or that the will was the product of fraud, duress, or undue influence. The court, nonetheless, rejected the fiancée's attempt to probate the document either as a nuncupative or a holographic will.<sup>246</sup> As a result, the decedent's property was distributed under the terms of his prior will that did not reflect his testamentary intent. Because decedent had not yet married the fiancée, she had no claim as an omitted spouse or to an elective share.<sup>247</sup>

In the case of *In re Moon's Will*, the decedent decided to make his will so he wrote out his wishes in a memorandum.<sup>248</sup> He then took this memorandum to his friend and neighbor and asked him to write out a formal will. The neighbor did so. The decedent read the document and, satisfied that it captured his intentions, he asked the neighbor and another person to go with him to the town clerk to execute the document. When they were all together, the testator informed them that the document was his will, and they all signed as witnesses. Unfortunately, the testator himself neglected to sign the document.<sup>249</sup> The court determined that the name "James H. Moon" on the will was not written by the neighbor as the testator's signature but merely to identify whose will it was.<sup>250</sup> Because the

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244. *Id.* § 2-503, 8 U.L.A. 146.

245. *In re Estate of Cote*, 176 Vt. 293, 294, 848 A.2d 264, 265 (2004).

246. *Id.* at 298–99, 848 A.2d at 268–69.

247. *Id.* at 294–99, 848 A.2d at 265–69.

248. *In re Moon's Will*, 107 Vt. 92, 94, 176 A. 410 (1935).

249. *Id.* at 94, 176 A. at 411.

250. *Id.* at 98, 176 A. at 412.

court held that the testator had not intended those words to be his signature, the court denied probate to the will.<sup>251</sup> Again, the testator's clear testamentary intent was disregarded and his property distributed to others.

In a jurisdiction that has adopted the UPC, a court would have allowed the documents in both these cases to be probated as wills. In *Cote*, the document met all the requirements of a holographic will. The material portions were written in the decedent's own handwriting, and it was signed by him.<sup>252</sup> There was even extrinsic evidence—the testimony of the mother of decedent's fiancée—that the document was the decedent's will. She also testified that he gave her the will for safekeeping and to give to his fiancée in the event of his death. And she had signed the document as a witness. Such evidence would be admissible under UPC § 2-502(c) to establish that the document was his will.<sup>253</sup>

The will in *Moon*, on the other hand, would only be allowed probate under the dispensing power in UPC § 2-503 because the decedent had not signed the will.<sup>254</sup> There was sufficient evidence in that case that the decedent intended the document to be his will. There were, in fact, three witnesses to it and those witnesses were all present at the same time in the same place to attest and subscribe to the will. In both cases, the decedent's clear intent was frustrated by the rigid formalities imposed by Vermont law.

While UPC § 2-503 might appear to be totally open-ended, allowing any and all documents to be probated as wills, there are two important safeguards in it. First, the document must be written and it must indicate a testamentary intent. Second, the evidence of the decedent's intent must be clear and convincing.<sup>255</sup> In both *Cote* and *Moon* such clear and convincing evidence appears to have been present.

In a case similar to *Moon*, the Australian court allowed an unsigned document to be probated as a will.<sup>256</sup> In this case the husband and wife had wills that they wished to execute. They invited their neighbors over for this event. The husband then signed his will, and the witnesses signed both the husband's will and the wife's will. The wife never signed her will. The court accepted the wife's will without her signature, finding that there was clear and convincing evidence that she intended the document to be her

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251. *Id.* at 94, 99, 176 A. at 411, 413.

252. *In re Estate of Cote*, 176 Vt. 293, 294, 848 A.2d 264, 265 (2004); *see also* UNIF. PROBATE CODE § 2-502(b) (amended 1990), 8 U.L.A. 144–45 (1998).

253. UNIF. PROBATE CODE § 2-502(c), 8 U.L.A. 145 § 2-502(c).

254. *But see In re Estate of Williams*, 36 S.A. St. R. 423, 425 (Austl. 1984) (permitting the probate of an unsigned will since the court found that “there can be no reasonable doubt that the deceased intended the document to constitute his will”).

255. UNIF. PROBATE CODE § 2-503, 8 U.L.A. 146.

256. *In re Estate of Williams*, 36 S.A. St. R. at 425.

will. In this case, the likelihood that the wife deliberately avoided signing her will is extremely remote. If the court even suspected that such might be the case, for example, that the wife was under duress, the court could admit that evidence and refuse to probate the will.

In cases where there is evidence of duress, fraud, or undue influence, that evidence would not only undermine any evidence that the document is the testator's will, but also give rise to a separate claim of fraud or undue influence. These doctrines are well developed, and they are designed to protect the decedent as well as ensure that the decedent's true intent is given effect.<sup>257</sup> In light of these doctrines, there appears little need for the rigid, formalistic requirements of § 5.<sup>258</sup> Too often, as in *Cote* and *Moon*, these requirements undermine, rather than effectuate, the decedent's intent.

Another problem that may occur, particularly with wills that are not executed in the presence of an attorney, is the beneficiary who serves as a witness. While originally this fact alone was sufficient to invalidate a will, almost every jurisdiction has adopted a purging statute, such as title 14, section 10 of the Vermont Statutes Annotated, or allows a beneficiary to serve as a witness without penalty, such as UPC § 2-505. The original purpose of the prohibition against a beneficiary serving as a witness was to ensure that the individual would be competent to testify in court during the probate process.<sup>259</sup> Purging statutes were later adopted to allow the beneficiary to testify.<sup>260</sup> Beneficiaries are no longer incompetent to testify<sup>261</sup> although the fact that a witness will profit from the will can be shown to impeach that witness's credibility.<sup>262</sup> The prohibition against a

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257. See, e.g., *In re Estate of Roche*, 169 Vt. 596, 597, 736 A.2d 777, 779 (1999) (noting that “[u]ndue influence occurs when the testator no longer exercises free will, causing the resulting document to be tainted”); *In re Estate of Raedel*, 152 Vt. 478, 481, 568 A.2d 331, 332 (1989) (stating that “[a] will should not be enforced, however, if it is shown to be the product of undue influence”); *In re Estate of Laitinen*, 145 Vt. 153, 159, 483 A.2d 265, 269 (1984) (stating that findings of undue influence are found by trial courts on a case-by-case basis); *In re Estate of Rotax*, 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981); *In re Estate of Brown*, 114 Vt. 380, 382, 45 A.2d 568, 569 (1946) (affirming the lower court's holding that there was ample evidence of undue influence); *In re Everett's Will*, 105 Vt. 291, 301, 166 A. 827, 830 (1933) (“In order to avoid a will on the ground of undue influence, the influence must be such as to destroy the free agency of the testator at the time and in the very act of making the instrument . . . .”); *In re Moxley's Will*, 103 Vt. 100, 112, 152 A. 713, 717 (1930) (describing the operation of the undue influence doctrine).

258. VT. STAT. ANN. tit. 14, § 5 (2002).

259. See ATKINSON, *supra* note 39, at 309 (noting that competent witnesses could be interested witnesses and therefore were barred from testifying about the will).

260. *Id.*

261. 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 582 (2d ed. 1923). Wigmore notes that the origins of the rule disqualifying parties and interested persons are obscure. *Id.* § 575. It is interesting to note that the prohibition arose in the 1500s about the same time as the Statute of Wills. *Id.*

262. *Id.* § 966.

beneficiary serving as a witness or losing his bequest if he does, has little to do with preventing fraud, duress, and undue influence. As a result, the purging statute serves primarily as a trap for the unwary and unsophisticated testator who executes his or her will without the assistance of an attorney. Such testators are more likely to choose the people they know and trust to serve as witnesses, and these are precisely the people that the testators have also selected as their beneficiaries. When the testator is old or ill, the probability of this happening is greatly increased. Purging these witnesses of their bequests undermines the decedent's intent and serves no valid countervailing purpose.

Vermont excludes heirs from the operation of the purging statute. That is, an heir can be a witness to a will and still receive property under the terms of the will. The apparent rationale for this exclusion is that the witness-beneficiary-heir would acquire the property in the event that the will was invalid. Heirs, however, are as likely, if not more likely, than non-heir-beneficiaries to have an interest in the will or to engage in fraud, duress, or undue influence. Neither the purging statute nor the prohibition against a beneficiary serving as a witness provide any additional protection for decedents.

The execution requirements are designed to ensure that only the testator's final statement of testamentary intent, rather than any preliminary or tentative statement, is given effect and that the will is not the product of fraud, duress, lack of mental capacity, or undue influence. Do the Vermont execution requirements perform this task better than those of the UPC? There is no evidence to suggest that claims of lack of capacity, fraud, or undue influence are more likely to be brought if there are only two witnesses instead of three or when the witnesses are not both present when the testator signs her will than when they are. There is also no real evidence that holographic wills are more, or less, likely to be the product of fraud, duress, or undue influence.

Perhaps the only real safeguard against these abuses is the presence of a lawyer at the drafting and the execution of a will. Even then, the duress or undue influence might not be discovered unless the client confides in the lawyer or the lawyer already knows the client. In all such cases, the claims will be raised by family members during probate of the will and they will bear the burden of proof, at least initially. The existence of a number of such cases in Vermont<sup>263</sup> indicates that the rigid will execution requirements have not prevented these problems from occurring.

If the formalities required in Vermont cannot prevent undue influence

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263. See *supra* note 257.

and fraud, then perhaps the UPC regime is preferable. The drafters believed that the law should facilitate, rather than restrict, the testator's disposition of her property no matter how informal the document. In UPC jurisdictions, it is likely that some tentative or draft documents have been admitted to probate as the decedent's final will and property is distributed according to those documents even though that was not really and truly the decedent's final intent. In Vermont, some documents that are clearly the decedent's will are ignored. If the lodestar is to give effect to the decedent's intent, then the UPC's more relaxed and realistic execution requirements seem preferable. The distribution of property that occurs through admission of draft documents may, in the final analysis, be closer to the decedent's intent than distribution pursuant to the rules of intestacy. On the other hand, the errors of omission that occur because of the Vermont due execution requirements thwart the decedent's known intent. The choice between these two evils seems clear.

#### B. Contracts to Make Wills

There is not a significant difference between the requirements of the UPC and those in Vermont with regard to contracts to make wills. In this situation, contract law, rather than the law of wills, applies. UPC § 2-514 requires that there be written evidence of the agreement. The writing may be (1) a will provision stating the contract terms, (2) an express reference to the contract in the will plus extrinsic evidence of the terms, or (3) even a writing signed by the decedent evidencing the contract.

The Statute of Frauds requires a written contract whenever the contract involves the conveyance of real property or the contract cannot be performed within one year. These two situations cover the vast multitude of will-contract cases. Vermont recognizes this and usually requires a writing.<sup>264</sup> The Vermont Supreme Court has, however, dispensed with a writing when equitable considerations dictate. In *In re Estate of Gorton*,<sup>265</sup> the decedent promised her son and daughter-in-law certain property if they would share the expenses of it and help care for her. Although they did so, and in fact expended their own funds to survey the property prior to transfer, the decedent did not convey the property to them during life or in her will. The Vermont Supreme Court held that these facts were sufficient

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264. VT. STAT. ANN. tit. 12, § 181 (2002); see *Martin v. Eaton*, 140 Vt. 134, 136, 436 A.2d 751, 753 (1981) (citing the Vermont statute of frauds to illustrate that contracts for the sale of land must be in written form); *First Nat'l Bank of St. Johnsbury v. Laperle*, 117 Vt. 144, 149, 86 A.2d 635, 638 (1952) (describing the purpose of the Statute of Frauds and why a will in writing satisfies the Statute of Frauds).

265. *In re Estate of Gorton*, 167 Vt. 357, 706 A.2d 947 (1997).

to allow a court to order specific performance of an oral contract to convey land because otherwise *the mother* would have been able to perpetrate a fraud. The court remanded the case to the trial court to determine whether there was reliance by the son and daughter-in-law that would justify specific performance.<sup>266</sup>

Equitable principles and common sense appear to prevail at least in this area.<sup>267</sup> Equitable principles have also been applied in Vermont in the absence of a statute to prevent a killer from inheriting from his victim.<sup>268</sup> These situations stand in stark contrast to the formalities required for due execution of wills.

### C. Construction of Wills

Once a court admits a document to probate as the decedent's will many questions of interpretation may arise. One common problem is how to dispose of the decedent's many items of personal property. While some decedents are content to leave all such property to one or a small group of persons and let them divide these assets, other decedents want particular items to go to particular people. These decedents often make lengthy lists of who should receive which items. The doctrine of incorporation by reference<sup>269</sup> is of limited benefit because, under this doctrine, the list must be in existence at the time the will is executed. Unfortunately, people being what they are, they change their minds and, therefore, the list. The result is that the decedent's intent is disregarded and the personal property is distributed either under the prior list if it was not destroyed, or under the residuary clause of the will if the prior list is unavailable, or, in extreme cases, in intestacy if, for example, the decedent's will did not have a residuary clause. Vermont appears to follow the doctrine of incorporation by reference.<sup>270</sup>

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266. *Id.* at 364, 706 A.2d at 952.

267. *See Nichols v. Nichols*, 139 Vt. 273, 278, 427 A.2d 374, 377 (1981) (deciding that where the Statute of Frauds did not bar a mother's conveyance of the family farm to one son under an oral contract similar to that in *In re Gorton*).

268. *In re Estate of Mahoney*, 126 Vt. 31, 220 A.2d 475 (1966), the decedent's wife shot him and was convicted of manslaughter. The decedent was survived by his wife and his parents. *Id.* at 32, 220 A.2d at 476. The court held that the widow could not inherit because to do so would allow her to profit from her own wrongdoing. *Id.* at 34, 220 A.2d at 478. In the absence of any statutory provision, the court noted that a constructive trust would be an appropriate remedy. *Id.* at 35, 220 A.2d at 478-79. Subsequently, the Vermont legislature enacted § 551 that bars anyone who is convicted of intentionally and unlawfully killing the decedent to inherit or take under the decedent's will. VT. STAT. ANN. tit. 14, § 551(6) (2002).

269. UNIF. PROBATE CODE § 2-510 (amended 1990), 8 U.L.A. 156 (1998).

270. The only Vermont cases that mention the doctrine of incorporation by reference are *In re Harris' Estate*, 82 Vt. 199, 72 A. 912 (1909), and *In re Will of Norris*, 123 Vt. 116, 183 A.2d 519

The UPC not only permits incorporation by reference, but it also includes a more extensive solution to this vexing problem—§ 2-513. This section allows the decedent to refer to a list or other document in her will and then to create and revise the list or document as many times as she wants, even *after* the will is executed. The UPC does require certain safeguards. The list must be written and signed by the testator. The list must identify the items and the recipients with reasonable certainty. And the list can only dispose of items of tangible personal property—it cannot dispose of land, money, or intangibles. Vermont, of course, has no comparable provision.

Another issue arises when the testator leaves specific bequests and then disposes of the property during her life. It is not always clear what the testator would want to happen. Vermont follows the traditional doctrine of ademption by extinction.<sup>271</sup> Under this doctrine, the beneficiary loses all interest in property that the testator disposes of before death. The UPC adopts a different approach in § 2-606. This section reverses the common law rule and gives the beneficiary (1) the balance of any purchase price, (2) any condemnation award, (3) proceeds on fire or other casualty insurance, (4) property acquired as a result of foreclosure, or (5) replacement property for the specifically devised property. It even provides that the beneficiary may receive the value of that property if doing so is consistent with the testator's manifest plan of distribution.<sup>272</sup> Here, as in intestacy, the primary concern of the UPC is to give effect to the decedent's probable intent.

Neither ademption nor its opposite appear compelling. An equal number of testators would probably prefer that the beneficiary not receive the proceeds of a sale or condemnation or even replacement property as

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(1962). In *Harris*, the court held that the issue was one of advancement as “[t]he provisions of this will do not incorporate or attempt to incorporate into the will any book or other evidence of the gifts and advances, and the question of what is necessary to the incorporation into a will of a paper referred to therein does not arise in this case.” *In re Harris' Estate*, 82 Vt. at 209, 72 A. at 96.

In *Norris*, there were two memoranda. The one referring to decedent's oriental rugs was referred to in the will and physically attached to it. *In re Will of Norris*, 123 Vt. at 116–17, 183 A.2d at 519. The other was a document dated 1961 that was apparently left with decedent's attorney. *Id.* at 118, 183 A.2d at 520. The probate court gave no effect to the 1961 document, and the Vermont Supreme Court agreed because there was no reference to that document in the will. *Id.* at 118, 119, 183 A.2d. at 520, 521. The Supreme Court did hold that the individual named in the oriental rug memorandum had standing to contest the probate proceedings. *Id.* at 120, 183 A.2d at 521. In reversing and remanding on this issue, the court noted that “[t]he law in this state as to incorporation by reference in a will remains undeveloped. If the appeal is dismissed, the appellant will be denied an opportunity to be heard on this question.” *Id.*

271. See *In re Barrow's Estate*, 103 Vt. 501, 506, 156 A. 408, 410 (1931) (stating that “[a] specific legacy is adeemed and the legatee takes nothing where the particular property has ceased to exist or has been disposed of by the testator during his lifetime”).

272. UNIF. PROBATE CODE § 2-606(a), 8 U.L.A. 176.

those that would. A true search for the decedent's intent would require a case-by-case determination based on all the facts and circumstances. Often evidence will be lacking. Courts have refused to engage in such a fruitless search. On balance, either rule appears to deal adequately with the problem.

A more critical issue arises when a beneficiary predeceases the testator. Since the beneficiary cannot receive the property, the question is who should take the property in place of the deceased beneficiary. Vermont's anti-lapse statute provides that if a bequest is to a "child or other kindred of the testator" then such child's or kindred's issue take in place of the deceased beneficiary.<sup>273</sup> This assumes, of course, that the testator did not provide otherwise in the will.

UPC § 2-603 goes much further. First, the category of beneficiaries is broader in some respects and narrower in others. Unlike Vermont, the UPC extends its anti-lapse provisions to the testator's step-children as well as to the donor of a power of appointment exercisable by the testator's will. The UPC, however, otherwise limits the application of its anti-lapse statute to those relatives who are descendants of the decedent's grandparents and not to all decedent's kindred.

Another difference between these two anti-lapse statutes is that the UPC provision explicitly applies to class gifts, unless the class is a multi-generational class that already requires survival to the time of possession.<sup>274</sup> The Vermont statute makes no mention of class gifts, and the court has not had to face this issue. It is, therefore, unsettled whether the other class members or the issue of a deceased class member would be entitled to the property when one class member predeceases the testator.

Perhaps the most radical component of the UPC anti-lapse statute is the provision that states that words of survivorship alone are insufficient to prevent application of the statute.<sup>275</sup> Usually, words mean what they say. And when a testator says that the property goes to "my brother, Bob, if he survives me," it is assumed that the testator does not want Bob's issue to take if Bob is dead. Not so in the UPC. To prevent the deceased beneficiary's issue from taking, the testator would need to include a specific alternative devise of the property, such as "to my brother, Bob, and if he does not survive me, then to my sister, Sally." In some cases, such as "to my brother, Bob, if he survives me," the creation of a substitute gift in the beneficiaries' issue is justified. In others, such as "to my surviving brothers and sisters," the result is far more dubious. The UPC does not distinguish

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273. VT. STAT. ANN. Tit. 14, § 558 (2002).

274. UNIF. PROBATE CODE § 2-603(b)(2), 8 U.L.A. 164-65.

275. *Id.* § 2-603(b)(3), 8 U.L.A. 164-65.



between these two situations, in both creating substitute gifts in the deceased beneficiary's issue.

The result in Vermont would, most likely, be different. In the first case, the bequest would lapse and the property would pass to the residue. In the second, the surviving siblings would take.

While UPC § 2-513 provides some justification for adoption of the UPC, neither the reversal of the ademption rule nor the intricacies of the UPC anti-lapse statute do so. Both are more likely to upset settled expectations and neither intrinsically seems to accord more closely with the testator's probable intent.

#### D. Revocation and Revival

Vermont law regarding the revocation and revival of a will is quite similar, but not identical, to the UPC. A testator can revoke a prior will either by a subsequent writing or by a physical act.<sup>276</sup> The testator's intent to revoke, without more, is insufficient. The testator must act upon that intent either by executing an appropriate writing or by performing a revocatory act.<sup>277</sup> Whether or not a revoked will has been revived, depends on the testator's intent and is determined by all the facts and circumstances.

In Vermont, a testator can revoke a prior will by executing another will that explicitly revokes the first will or that does so implicitly by disposing of all of the testator's property.<sup>278</sup> A testator can also revoke a will by a codicil or any other writing that was signed by the testator and three competent witnesses.<sup>279</sup> The writing must be executed in the same manner as the will itself.<sup>280</sup> A subsequent will or codicil that does not explicitly revoke the prior will and that disposes of only part of the testator's property revokes the first will only with respect to that property.<sup>281</sup> The UPC follows these same rules.<sup>282</sup>

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276. VT. STAT. ANN. tit. 14, § 11; UNIF. PROBATE CODE § 2-507, 8 U.L.A. 151-52.

277. *See* Heirs of Blanchard v. Heirs of Blanchard, 32 Vt. 62, 63-64 (1859) (describing that under Vermont law a will may not be "revoked unless by implication of law, or by some will, codicil or other writing executed in the same manner which is prescribed for the execution of wills, or by burning, cancelling, or obliterating, with the intention of revoking, the will on the part of the testator"). In this case, the evidence showed that the testator believed that he could only revoke his will in the presence of a magistrate and witnesses. *Id.* at 64. Before the magistrate and witnesses arrived, however, the will was taken from the testator without his consent. *Id.* The court held that the will had not been revoked. *Id.* at 65. It did note in dicta that if there had been fraud, a court in equity might interfere to prevent a guilty person from taking advantage of such fraud but that such question was not before it. *Id.*

278. VT. STAT. ANN. tit. 14, § 11; *In re* Peck's Estate, 101 Vt. 502, 508, 144 A. 686, 688 (1929).

279. VT. STAT. ANN. tit. 14, § 11.

280. *Id.*

281. *See* Holley v. Larrabee, 28 Vt. 274, 277-78 (1856) (describing a situation in which the defendant was entitled to furniture impliedly left to him by a codicil executed after the will); *In re* Estate

A testator in Vermont can also revoke her will by “burning, tearing, canceling or obliterating the same, with the intention of revoking it.”<sup>283</sup> In some jurisdictions, a cancellation must touch the actual words of the will.<sup>284</sup> In *Warner v. Warner’s Estate*, the testator’s will “was written upon a sheet of foolscap paper and covered the first page and about one-third of the second page.”<sup>285</sup> There were no marks or obliteration, cancellation or defacement on the face of the will, “but upon the last half of the second page were written the following words: ‘This will is hereby cancelled and annulled. In full this 15th day of March in the year 1859.’”<sup>286</sup> “Written lengthwise of the paper as folded, and below the filing of the paper upon the back, being the outside on fourth page, were these words: ‘Canceled and is null and void. I. Warner.’”<sup>287</sup>

The court held that the writing on the will was sufficient as a cancellation, which is an act of revocation.<sup>288</sup> The court found that an act of revocation required that something be done physically to the will itself to indicate the testator’s intent to revoke it.<sup>289</sup> The court found that earlier cases had established that *any* burning, tearing, or obliteration was sufficient, even if none of the writing itself was actually destroyed.<sup>290</sup> In the instant case, the court held that the decedent’s writing was sufficient as an act of revocation because the writing was on the will, even though it did not touch any of the words and because the writing was accompanied by the testator’s intention to revoke his will.<sup>291</sup>

The cases cited in *Warner* indicate that other revocatory acts, such as burning or tearing, need not touch the words of the will. This is consistent

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of Daniels, 116 Vt. 190, 193, 71 A.2d 586, 588 (1950) (holding that “[a] codicil inconsistent with prior provisions of a will revokes the prior provisions”); Bacon v. Bacon, 55 Vt. 243, 247–48 (1882) (stating that the codicil revoked some but not all of the testator’s property provisions).

282. UNIF. PROBATE CODE § 2-507 (amended 1990), 8 U.L.A. 151–52 (1998).

283. VT. STAT. ANN. tit. 14, § 11.

284. See, e.g., Kronauge v. Stoecklein, 293 N.E.2d 320, 323 (Ohio 1972) (adopting the rule in Dowling v. Gilliland, 122 N.E. 70, 72 (Ill. 1919), that a will is not revoked if none of the words of the will are touched by the writing of the intended revocation); Thompson v. Royall, 175 S.E. 748, 750 (Va. 1934) (requiring that the cancellation touch the written part of the will to revoke it). Courts require words of cancellation to touch the words of the will to distinguish a cancellation, which is a revocation by physical act, from revocation by a subsequent writing, which must be executed with the same formalities as a will. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. g (1998) (“Some courts have required words of cancellation to touch the words on the will . . .”). The Restatement § 4.1 and the UPC § 2-507 reject the need for this distinction.

285. Warner v. Warner’s Estate, 37 Vt. 356, 357 (1864).

286. *Id.*

287. *Id.*

288. *Id.* at 367.

289. *Id.* at 361.

290. *Id.*

291. *Id.* at 367.

with other jurisdictions<sup>292</sup> as well as the UPC.<sup>293</sup>

In some cases, the decedent may have performed a revocatory act on the will, but there are no witnesses to the testator's actions and the will itself cannot be found. When the will was in the testator's possession and it cannot be found after the testator's death, a presumption arises that the testator herself revoked the will. This rule is only a presumption, however, and evidence can overcome that presumption. Vermont follows this rule<sup>294</sup> as do jurisdictions that have adopted the UPC.<sup>295</sup>

In other cases, the testator marks through some provisions of the will, but not others. In these cases the question becomes whether the testator intended to revoke the entire will or only those provisions that are marked. While some jurisdictions permit partial revocation by physical act,<sup>296</sup> Vermont does not. In *In re Knapen's Will*, the testator had a properly executed typewritten will.<sup>297</sup> Some of the provisions had been marked by a line through them in pen and different names or amounts of property were written in the margins in testator's handwriting.<sup>298</sup> The court held that the testator's actions were insufficient for a revocation and, thus, the original language of the will was to be given effect.<sup>299</sup> The court distinguished the *Warner* case because in that case the testator had intended to revoke the

292. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. g; ATKINSON, *supra* note 39, at 437.

293. Section 2-507(a)(2) provides that: "A burning, tearing, or canceling is a 'revocatory act on the will,' whether or not the burn, tear or cancellation touched any of the words on the will." UNIF. PROBATE CODE § 2-507 (amended 1990), 8 U.L.A. 151-52 (1998).

294. *In re Will of Montgomery*, 121 Vt. 344, 345, 162 A.2d 344, 345 (1960); *Minkler v. Minkler's Estate*, 14 Vt. 125, 125 (1842).

295. *See, e.g.*, *Matter of Travers' Estate*, 589 P.2d 1314 (Ariz. Ct. App. 1978) (stating that there is a rebuttable presumption that if a will cannot be found it has been destroyed by the testator); *In re Estate of Perry*, 33 P.3d 1235, 1236 (Colo. Ct. App. 2001) (stating that "at common law, when a will last seen in possession of the decedent cannot be found . . . there is a rebuttable presumption that the decedent destroyed the will with intent to revoke it"); *In re Estate of Botko*, 541 N.W.2d 616, 619 (Minn. Ct. App. 1996) (finding that "the law permits an inference of revocability when an original will is not produced and the record shows no evidence that the original will was kept by someone other than decedent"); *In re Estate of Kerr*, 918 P.2d 1354, 1359-60 (N.M. Ct. App. 1996) (finding that the trial court correctly determined that the presumption of revocation was present, but also finding that the wife had successfully overcome the presumption).

296. Jurisdictions allowing partial revocation by physical act have statutes which expressly permit such revocation. *See, e.g.*, IND. CODE ANN. § 29-1-5-6 (Michie 2000 & Supp. 2004); IOWA CODE ANN. § 633.284 (West 1999); KY. REV. STAT. ANN. § 394.080 (Michie 1999); 20 PA. CONS. STAT. ANN. § 2505 (West 1975); R.I. GEN. LAWS § 33-5-10 (1995); WIS. STAT. ANN. § 853.11 (West 2002).

297. *In re Knapen's Will*, 75 Vt. 146, 147, 53 A. 1003, 1004 (1903).

298. *Id.* at 148, 53 A. at 1004.

299. *Id.* at 149, 152, 53 A. at 1004-05.

entire will by his actions whereas in the instant case the testator had only intended to revoke parts of her will.<sup>300</sup>

The UPC allows partial revocation by physical act. Section 2-507(a)(2) specifically states that the testator can revoke a will by “performing a revocatory act on the will, . . . or any part.”<sup>301</sup> The comment to this section notes that it explicitly permits partial revocation.<sup>302</sup>

Finally, a will may be revoked “by implication of law.”<sup>303</sup> The acquisition of property after the execution of a will does not, by itself, revoke the will.<sup>304</sup> The residuary clause of the will would encompass after-acquired property and if there is no residuary clause, then the property would pass by intestacy. A conveyance by the testator of property included in a will does not revoke the will although the will can no longer dispose of that property since the testator no longer owns it.<sup>305</sup>

In feudal times, marriage revoked a will made by a woman because her husband became the owner of her property and she no longer had the right to dispose of it.<sup>306</sup> As this rule has long since been repealed, marriage does not revoke a will executed before the marriage.<sup>307</sup> Instead, the surviving spouse has the right to elect against the decedent’s will.<sup>308</sup> This will result in a disruption of the testator’s estate plan, but it will not revoke the will. This is true in Vermont as well as under the UPC.

The UPC does provide that divorce revokes a will.<sup>309</sup> Vermont does not have any explicit statutory provision or case law on this issue. Of course, if the testator had left property “to my spouse,” the ex-spouse would not be entitled to the property because he would no longer be the spouse. Since many divorcing couples immediately execute new wills excluding the former spouse, this issue has not been litigated in Vermont and it is not clear what the result would be if the will referred only to the ex-spouse by name and not by status. Given that the Vermont Supreme Court has held that there must either be a duly executed writing or an appropriate revocatory act, it is possible that the ex-spouse would be entitled to take.

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300. *Id.* at 149, 53 A. at 1004.

301. UNIF PROBATE CODE § 2-507(a)(2) (amended 1990), 8 U.L.A. 151–52 (1998).

302. *Id.* § 2-507 cmt., 8 U.L.A. 152.

303. VT. STAT. ANN. tit. 14, § 11 (2002).

304. *Graves v. Sheldon*, 2 D. Chip. 71, 76 (Vt. 1824).

305. *See In re Fuller’s Estate*, 71 Vt. 73, 76, 42 A. 981, 981–82 (1898) (holding that the testator’s land conveyance was not enough to revoke his will).

306. *Morton v. Onion*, 45 Vt. 145, 148 (1872).

307. *Id.* at 152.

308. VT. STAT. ANN. tit. 14, §§ 401, 465.

309. UNIF. PROBATE CODE § 2-804(b)(1) (amended 1990), 8 U.L.A. 217–18 (1998).

Finally, both Vermont law and the UPC provide that a murderer is not entitled to inherit or take under the will of his victim.<sup>310</sup>

Revival occurs when the testator intends that a previously revoked will be given effect. The only Vermont case on this issue, *In re Gould's Will*, is a typical example.<sup>311</sup> In that case the testator executed a will in 1890 and gave the will to his son for safe-keeping. The testator made another will in 1896. In 1899, the testator burned the 1896 will in the presence of his son and asked his son to tell no one about the 1896 will as the 1890 will was how he wanted his property to be distributed. The court, noting that republication is not necessary to revive a revoked will, held that revival depended on the testator's intent and that there was sufficient evidence of the testator's intent to allow probate of the 1890 will.<sup>312</sup>

The UPC agrees that the prevailing issue is the testator's intent. Section 2-507 establishes a series of presumptions.<sup>313</sup> First, if a subsequent will that had wholly revoked a prior will is then revoked by a revocatory act, the prior will is presumed to remain revoked. Evidence of the testator's intent to revive the prior will may overcome this presumption. Second, if a subsequent will that had only partially revoked a prior will is revoked by a revocatory act, the revoked provisions of the prior will are presumed to be revived unless the evidence establishes otherwise. Third, if a subsequent will (the second will) that revoked a prior will (in whole or in part) is revoked by a later will (the third will), then the prior will (the first will) is presumed to remain revoked. In this situation, provisions of the third will may revive the first will.

Adoption of the UPC provisions governing revocation and revival would not change Vermont law, except to the extent that it allows partial revocation by physical act. Adoption of the UPC would, however, clarify unanswered questions in Vermont jurisprudence. One example, as noted above, is the effect of divorce on a will.

#### D. Conclusion

The differences between Vermont and the UPC with respect to the execution requirements are significant. Vermont imposes rigid, formulaic requirements that are ostensibly designed to protect the decedent and ensure that only the decedent's true intentions are given effect in probate. The UPC, by contrast, adopts a permissive view of the execution requirements,

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310. VT. STAT. ANN. tit. 14, § 551(6); UNIF. PROBATE CODE § 2-803, 8 U.L.A. 211-12.

311. *In re Gould's Will*, 72 Vt. 316, 319, 47 A. 1082, 1082 (1900).

312. *Id.* at 320-21, 47 A. at 1083.

313. UNIF. PROBATE CODE § 2-507, 8 U.L.A. 151-52.

allowing (1) witnesses to sign the will without being in each other's presence,<sup>314</sup> (2) holographic wills,<sup>315</sup> and (3) even typed or printed documents that have not been witnessed.<sup>316</sup> In doing so, the UPC focuses on the testator's intent rather than the ritual of the will execution. Because the alternative is most often distribution of the decedent's property through intestacy, the UPC's more permissive approach seems preferable. Intestacy is a "one size fits all" statutory scheme that very often does not reflect the decedent's intent or the intricacies of the decedent's family relationships. The Vermont provisions, which place a premium on formality, often serve as a trap for unwary and unsophisticated testators. The UPC, by contrast, facilitates the transfer of property by will of the average testator.

The choice between existing Vermont law and the UPC is less dramatic with regard to doctrines interpreting a testator's will. While UPC § 2-513 provides an obvious advantage, the abandonment of ademption by extinction does not present as clear a benefit. The anti-lapse provision of the 1990 version of the UPC § 2-603, on the other hand, upsets well-settled law and often ignores the clearly stated intent of the testator. If Vermont were to adopt the UPC, it should consider retaining its existing anti-lapse provision or enacting the 1969 version of the UPC's anti-lapse statute.<sup>317</sup> Although the application of the UPC's anti-lapse provision is limited to descendants of the decedent's grandparents, that provision does explicitly include class gifts.

Finally, existing Vermont Law regarding revocation and revival is essentially identical to the UPC provisions. As a result, these doctrines present no justification for the adoption of the UPC.

#### CONCLUSION

Vermont's probate statutes, particularly those provisions governing intestacy, the spousal elective share, and will execution, are antiquated and

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314. *Id.* § 2-502(a)(3), 8 U.L.A. 144.

315. *Id.* § 2-502(b), 8 U.L.A. 144-45.

316. *Id.* § 2-503, 8 U.L.A. 146.

317. Section 2-605 of the 1969 version of the Uniform Probate Code provided:

If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee they take equally, but if of unequal degree than those of more remote degree take by representation. One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

confusing. Practitioners and even probate judges disagree on the correct answer to many issues. There is little, if any, guidance from the Vermont Supreme Court because few cases are litigated to this level. Many of the existing cases were decided in the 19th century when circumstances more closely resembled feudal times than the realities of the 21st century.

Vermont should seriously consider adopting the substantive provisions of Article 2 of the Uniform Probate Code. Doing so would provide rules that more accurately reflect the probable intent of decedents and the complex family relationships of the 21st century. Adoption of the Uniform Probate Code would also provide much needed clarity and certainty in the law, not only in the statutory provisions themselves, but also in the reporter's notes and decisions from other jurisdictions. Vermont has already adopted many uniform acts governing the transfer of property, such as the Uniform Gifts to Minors Act, the Uniform Simultaneous Death Act, and the Uniform Disclaimers Act. Adopting Article 2 of the UPC would be consistent with these provisions and would propel Vermont into the 21st century.

Stability in the law is generally a virtue, and change should not be undertaken lightly. Uniformity, i.e., consistency with other jurisdictions, while beneficial in our mobile society, is not, in and of itself, a sufficient justification for changing Vermont law. The justification for change lies instead in the failure of existing Vermont law to meet the needs of its citizens. The availability of books and internet sources on wills, printed will forms, and even computer programs encourage individuals to "take the law into their own hands" and draft their own wills. The law should, to the extent possible, facilitate rather than thwart these initiatives. The primary purpose, after all, should be to effectuate the decedent's intent. And for those who die intestate, the law should better reflect their probable intent, based on the realities of modern life, not on antiquated principles of feudalism.