Intestate Succession and Wills Law: The New Probate Code

W. Garrett Flickinger

Recommended Citation
Available at: https://digitalrepository.unm.edu/nmlr/vol6/iss1/3

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the New Mexico Law Review website: www.lawschool.unm.edu/nmlr
INTESTATE SUCCESSION AND WILLS LAW: THE NEW PROBATE CODE

W. GARRETT FLICKINGER*

In 1973 the legislature of the State of New Mexico established a Probate Code Interim Committee to study the existing probate laws.¹ The Committee was composed of members from both houses of the legislature appointed by the Legislative Council. Its purpose was to “examine the statutes, constitutional provisions, regulations and court decisions governing probate law in New Mexico and recommend legislation or changes, if any are found to be necessary.”² At the time, it seemed understood that one of the functions of the Committee was to examine the Uniform Probate Code³ for possible adoption in New Mexico. The Committee spent two years in its deliberations, and in the 1975 legislative session introduced Senate Bill No. 1 for adoption as a new Probate Code. The bill was adopted in toto and signed into law.⁴ It will become effective July 1, 1976. The new Code rather closely follows the Uniform Probate Code, adopting its section numbers and in many cases its textual content.

The purpose of this article is to delve into the changes in present probate law⁵ occasioned by the new Code as well as to compare it with the UPC. For purposes of practical management the discussion will be limited to those sections of the new Code dealing with intestate succession and wills, the major substantive provisions of the Code. Thus the analysis to follow will examine only the provisions of Article II, Parts 1, 3, 5 and 6.

INTESTATE SUCCESSION

For purposes of discussion this portion will be subdivided into three subsections: (1) the general scheme of intestate distribution, (2) special classes, and (3) advancements, debts and miscellaneous.

General Scheme of Intestate Distribution

The basic scheme of intestate distribution has been clarified rather

---

¹Professor of Law, University of New Mexico, member of the National Advisory Committee on the Uniform Probate Code.
³Id. § 3.
⁴Uniform Probate Code.
⁵[1975] Laws of N.M. ch. 257.
than changed from the present probate law. Thus, the surviving
spouse is still entitled to the entire community property and one-
quarter of the separate property, with the issue receiving the remain-
ing three-quarters of the separate property. If there are no issue, all
the property passes to the spouse. If there is no spouse, all of the
property passes to the issue; if no issue, to the parents; if no
parents, to the issue of the parents; and if none, to the grand-
parents and their issue. Thus, New Mexico continues to follow the
parentelic system for descent and distribution. The major clarifica-
tion results from making specific provision for per stirpes distribu-
tion and for representation. The new Code provides that if issue
are to take, they participate per capita if they are all of the same
generation but if they are not all of the same generation then those
in the more remote generations must take if at all by representation
in shares per stirpes. It is also clear under the new Code that the
stirpes to be used for determination of such shares is the first genera-
tion in which there are members living. Thus the new Code accepts
the so-called Massachusetts rule on per stirpes distribution. Under
the present probate laws there is considerable confusion as to
whether distribution is per stirpes or per capita, and even more
importantly, where assuming a per stirpes distribution the stock
would be chosen under the Massachusetts rule or the California
rule. By adopting the new Code, such confusion and uncertainty is
now settled.

There are two further modifications in the scheme of descent and
distribution from the present law. First, under 29-1-15 the heirs of
the spouse of a decedent are entitled to inherit if the decedent dies
without surviving blood heirs. This provision is eliminated under the
new Probate Code. Accordingly, the property will escheat to the

6. Id. § 32A-2-102(B) and § 32A-2-102(A)(2) (N.M. Probate Code 1975).
7. Id. §§ 32A-2-102(A)(1) and 32A-2-102(B).
8. Id. § 32A-2-103(A).
9. Id. § 32A-2-103(B).
10. Id. § 32A-2-103(C).
11. Id. § 32A-2-103(D).
12. Ingram & Parnall, The Perils of Intestate Succession in New Mexico and Related Will
16. See generally the comment to Uniform Probate Code, § 2-106.
17. Ingram & Parnall, supra note 12, at 570-83.
18. The California rule, unlike the Massachusetts rule, chooses as the stirpes the genera-
tion nearest the ancestor regardless of whether any are living at the time of the ancestor's
state if the decedent dies without surviving heirs. Second, there is a provision in the new Code which is not taken from the Uniform Probate Code nor from the present New Mexico Probate Code but appears to have been adopted from the Colorado version of the UPC. It is designed to go beyond the Uniform Probate Code (which limits intestate inheritance to the issue of grandparents) by extending inheritance to the nearest lineal ancestors and their issue. The legislature appears to have decided that no property should escheat to the state so long as there are any blood relatives still living. The value of this provision is doubtful. The assumption that it is desirable to pass a decedent’s property to his blood relations no matter how remote is clearly debatable. The cost to the estate of trying to locate possible remote heirs frequently merely provides a boondoggle for genealogical investigators and guardians ad litem and results only in failure to locate such heirs. Also no provision is made as to the nature and extent of any such required search. More importantly, the provision adopted is incapable of rational interpretation. It provides that if there are no issue of grandparents to inherit, the property is to pass to the “nearest lineal ancestors and their descendants, the descendants collectively taking the share of their immediate ancestors, in equal parts.” At first glance, one might assume that the descendants of the nearest lineal ancestors would take the share of that ancestor in shares per capita regardless of their degree of kinship to the ancestor. Unfortunately, the reference to the descendants taking the share of their immediate ancestors adds confusion since that suggests representation. How can the descendants “collectively” take the share of their immediate ancestor unless the immediate ancestor is the same for all the descendants? Furthermore, does the legislature really intend that all the descendants share equally regardless of their degree of kinship? Because of its ambiguity, it is strongly suggested that this clause be eliminated, or if the legislature believes that it is necessary to pass the intestate’s property on to very remote heirs, the statute be changed to read intelligibly to produce such a result.

24. See general criticism of such a clause in Ingram & Parnall, supra note 12, at 589-90.
25. The author proposes the following as a means of accomplishing the legislative desires by language clearly understandable to the legal profession:

(E.) If there are none of the above, then to the next-of-kin in equal degree according to the rules of the civil law; provided, however, that no one may
Thus, with the exception of clarification on *per stirpes* distribution and elimination of inheritance by the heirs of the deceased spouse of the decedent, the new Probate Code continues essentially the same scheme of distribution as that of the present probate law. In contradistinction, the Uniform Probate Code provides a somewhat different distribution. As to the separate property, it provides that the surviving spouse takes the whole if there are no surviving issue or parents. If there are no surviving issue but a surviving parent or parents, or if there are surviving issue, all of whom are also issue of the surviving spouse, the spouse is entitled to the first $50,000 plus one half of the balance of the separate property. If some of the surviving issue are not also issue of the surviving spouse, the surviving spouse is only entitled to one half of the separate property.

Thus the UPC proceeds on the assumption that most married people prefer that their assets pass to the surviving spouse, particularly when the estate is small or moderate in size. Under such circumstances it avoids the necessity of guardianship proceedings where the children of the decedent and the surviving spouse are minors. By like token, when the children are not also children of the surviving spouse, the spouse is limited to only one-half regardless of the size of the estate because of the ever present possibility of conflict or unfairness between the children and a stepparent.

By retaining the present distribution scheme in the new Code, New Mexico appears to make certain the need for guardians of minor children regardless of how small the separate property may be. Furthermore the limitation to the surviving spouse of only one fourth of the separate property seems unduly niggardly, especially where it touches the estates of decedents who have retired, or simply

---

inheriting under this subsection unless he or she is related to the decedent at least as closely as the (seventh) degree; and provided further that where there are two or more kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

27. Id. § 2-102(A)(1)(ii).
28. Id. § 2-102(A)(1)(iii).
29. Id. § 2-102(A)(1)(iv).
30. See comment to Uniform Probate Code § 2-102.
31. But see comment to Uniform Probate Code § 3-915, adopted in the new Code, which suggests that such guardianship might not be necessary in view of the combined effect of §§ 3-915 and 5-103.
moved to New Mexico from a common law state and failed to acquire any estate under the community property aegis.\textsuperscript{32}

**Special Classes**

The present New Mexico laws grant to two special classes of persons the right to inherit from a decedent despite lack of a legitimate relationship by consanguinity: the adopted child\textsuperscript{33} and the child born out of wedlock.\textsuperscript{34} Under the new Probate Code, not only are these two classes provided for, but specific mention is made of the inheritance rights of the posthumous child, the half blood, and aliens. Since 1945 the New Mexico probate statutes have provided specifically for inheritance by adopted children. The 1945 law provided first that the child was entitled to inherit from the adopting parents as if it were a natural child.\textsuperscript{35} In 1951 New Mexico adopted a new and more comprehensive provision for inheritance by and from the adopted child. As a result of the 1951 amendment, the adopted child was placed into the blood line of the adopting parents and removed from the bloodline of the natural parents.\textsuperscript{36} The provision in Section 2-109(A)\textsuperscript{37} of the new Code, in much simpler language, adopts the same basic proposition. Accordingly, there will be no change in the present New Mexico law concerning the rights of inheritance by or from adopted children.

The present New Mexico statutes with regard to illegitimates provide for inheritance by and from such children if the child is recognized under law as a child of the parent or parents or if there is a written instrument signed by the parent demonstrating that it was executed with the intent of recognizing the child as an heir.\textsuperscript{38} The present statutes also provide that marriage between the parents legitimates the children for purposes of inheritance.\textsuperscript{39} Under the new Code the illegitimate child is first clearly regarded as a child of the mother for all purposes of intestate succession.\textsuperscript{40} Secondly, it is a child of the father if the mother and father had participated in a marriage ceremony either before or after the birth of the child.

\textsuperscript{32} See comment in Ingram & Parnall, \textit{supra} note 12, at 570.

\textsuperscript{33} N.M. Stat. Ann. \S 29-1-17 (1953).


\textsuperscript{35} [1945] Laws of N.M. ch. 16, \S 1; \textit{and see} Ingram & Parnall, \textit{supra} note 12, at 590-91.

\textsuperscript{36} [1951] Laws of N.M. ch. 62, \S 1; \textit{and see} Delaney v. First National Bank in Albuquerque, 73 N.M. 192, 386 P.2d 711 (1963); \textit{In re} Estate of Shehady, 83 N.M. 311, 491 P.2d 528 (1971).


\textsuperscript{38} \textit{Id.} \S 29-1-18 (Supp. 1975).

\textsuperscript{39} \textit{Id.} \S 29-1-20 (1953).

\textsuperscript{40} \textit{Id.} \S 32A-2-109(B) (N.M. Probate Code 1975).
regardless of whether the marriage was valid.\footnote{41} Finally, the illegitimate is also regarded as a child of the father if the paternity is established by law,\footnote{42} or if there is a writing signed by the father specifically recognizing the child as an heir.\footnote{43} Where the legitimacy is accomplished by marriage or by such a written instrument, then under the new Code the father and his kindred are entitled to inherit from the illegitimate child.\footnote{44} On the other hand, when paternity is established by adjudication, the father and his kindred are not entitled to inherit unless the father has openly treated the child as his own and has not refused to support him.\footnote{45}

The new Code adopts both the wording of the Uniform Probate Code and additional provisions from the present statute. It changes present law first by making clear that the illegitimate is always the child of the mother for purposes of inheritance by, from and through the mother and her kindred\footnote{46} and second by providing two additional means by which the child can be regarded as a child of the father for inheritance purposes: the marriage of the parents even if such marriage is void or a judicial determination of paternity. It differs from the UPC by retaining the present provision of the New Mexico Probate Code permitting written recognition as an heir by the father. The Uniform Probate Code section which provides that the paternal relationship can be established by adjudication before the father’s death or can be established after his death by “clear and convincing proof”\footnote{47} has also been changed. The new Probate Code for New Mexico provides the establishment after the death of the father must be made by “law.”\footnote{48} It is wholly unclear what is meant by this change, and a proposed amendment would return to the language of the Uniform Probate Code on this point.\footnote{49} In view of the uncertainty as to the meaning of “established by law,” it seems most necessary to use the Uniform Probate Code language in this

\footnote{41}{Id. at § 32A-2-109(B)(1).}
\footnote{42}{Id. at § 32A-2-109(B)(3).}
\footnote{43}{Id. at § 32A-2-109(B)(2).}
\footnote{44}{Id. at § 32A-2-109.}
\footnote{45}{Id. at § 32A-2-109(B)(3).}
\footnote{46}{This was the law under N.M. Stat. Ann. § 29-1-18 (1953) until it was amended in 1973 (N.M. Stat. Ann. § 29-1-18 (Supp. 1975)). The amendment was apparently thought necessary because of the Equal Rights Amendment to the N.M. Constitution. N.M. Const. art. 2, § 18.}
\footnote{47}{Uniform Probate Probate Code § 2-109(2)(ii).}
\footnote{49}{This language is apparently derived from the present law’s use of the term “under law” (see footnote 37 and accompanying text). The latter, in its context, appears to be a reference to an adjudication of paternity and as such bears some meaning, but as used in the new Code it cannot have such a reference since no such adjudication of paternity would be possible when the putative father is dead.
provision, and it is, therefore, hoped that the amendment will be adopted.

The present New Mexico intestacy statute provides for the posthumous child but the provision is really an omitted child provision. It gives to the posthumous child the right to take against the will of the father or mother rather than making any specific provisions in terms of its right to inherit in the event of intestacy. On the other hand, the right given to take against the will is to take "the same interest as though no will has been made." This seems to be a codification by implication of the common law right of the posthumous child to inherit by intestacy. The inclusion of this provision as a part of the chapter on intestacy lends support to such a proposition. The new Code specifically provides that such posthumous children shall inherit as if they had been born in the lifetime of the decedent. The provision is essentially the same as that of the Uniform Probate Code except that the wording has been changed to limit the provision to children of the decedent who are born posthumously. The Uniform Probate Code, by comparison, opens it to any "relative" of the decedent who was born posthumously to the intestate decedent. In view of the fact that the UPC provision is essentially declarative of the common law position, the curtailment in the new Code seems unnecessarily limiting. It appears that the change may derive from the present statute's provision which is limited to children. The limitation in the present statute, however, results from the right given to take against the will, a right not granted or even referred to in the new Code or the UPC.

Section 2-107 of the new Code provides that relatives of the half blood inherit as if they were of the whole blood. This is the first New Mexico statutory provision concerning intestacy rights of the half blood. It specifically solves a problem that might otherwise have been somewhat complex. Because there have been several views with regard to treatment of the half blood, both in Great Britain and in the United States, making a determination as to their treatment under the "common law" has always been difficult.

Finally Section 2-112 of the new Code follows the UPC in

---

51. See Ingram & Parnall, supra note 12, at 593.
55. See notes 48, 49 supra and text accompanying.
57. See Ingram and Parnall, supra note 12, at 583-87.
58. Atkinson, supra note 54, § 19 at 74.
giving aliens the same rights of inheritance as citizens. Unfortunately
the textual content is not that of the UPC\(^6\) but is a virtual repeat of
Section 70-1-24 of the present New Mexico laws.\(^5\) The result
appears to be the same, but the UPC language is much shorter and
simpler, and for the law as well as for lawyers "brevity is the soul of
wit."\(^6\)

**Advancements, Debts and Miscellaneous Provisions**

Three special provisions in the new Code taken directly from the
Uniform Probate Code concern matters which are not covered in the
present New Mexico statutes. The first of these deals with the prob-
lems of advancements.\(^6\) Most issues relating to advancements had
never been determined in New Mexico and were therefore open
questions.\(^6\) The new Code adopts the Uniform Probate Code provi-
sions intact. It provides that property given to an heir as an advance-
ment will be so treated but only if so declared in a contemporaneous
writing by the testator or acknowledged as such in writing by the
heir.\(^6\) It also provides that only in the event of total intestacy does
the doctrine of advancements apply. Thus, the question as to
whether or not an item is an advancement and therefore to be
counted against the heir to whom it was made in the distribution of
the intestate's property will be determined only by direct written
declaration of the testator or by acknowledgement by the heir. This
removes the unnecessary harshness the doctrine often engenders
because of the presumption that a gift by any person standing *in loco
parentis* to the donee is an advancement or the uncertainty fre-

60. UPC § 2-112 reads as follows: No person is disqualified to take as an heir because he
or a person through whom he claims is or has been an alien.

61. N.M. Stat. Ann. § 70-1-24 (Repl. 1961) which reads as follows:
Foreigners shall have full power and authority to acquire or hold real estate by
deed, will, inheritance, or otherwise, when the same may be acquired in good
faith and in due form of law, and also to alienate, sell, assign and transfer the
same to their heirs or other persons, whether such heirs or other persons be, or
not, citizens of the United States; and when a foreigner having title or interest
in any lands or estate dies, such lands or estate shall descend and vest in the
same manner as if such foreigner were a citizen of the United States; and such
circumstance shall not be an impediment to any person holding an interest in
said estate, although not a citizen of the United States, for all said persons
shall have the same rights and resources and shall, in all respects, be treated on
the same footing as native citizens of the United States with respect to the
personal estate of a foreigner dying intestate, and all persons interested in said
estate, under the laws of this state, whether foreigners or not.


64. See Ingram & Parnall, *supra* note 12, at 595; and see Harper v. Harris 294 F. 44 (8th
Cir. 1923); Sylvania v. Pruett, 36 N.M. 112, 9 P.2d 142 (1932).

quenty encountered in trying to determine whether an *inter vivos* gift was made as a "settlement or portion in life." The section also specifically requires that an advancement be valued as of the time the heir either came into possession or enjoyment of the property or at the time of the death of the decedent, whichever event occurs first. Finally, it provides that such an advancement is not to be counted against the issue of the heir receiving the advancement if the heir predeceases the testator unless the declaration by the testator specifically so provides. While this provision does not clarify all the problems created by the doctrine of advancements, it does, by requiring a written instrument, make the issue of advancements a much less pressing problem and will probably, for all practical purposes, eliminate it as an issue in the estate of most decedents.

Section 2-111 of the new Code provides that a debt owed to the decedent is not to be charged against the intestate share of any person other than "the debtor or his heirs." There is no comparable provision in the present New Mexico laws, and it differs rather drastically from the Uniform Probate Code. The latter provides that the debt can be charged against the intestate share *only* of the debtor and is not to be taken into account in determining the share of the issue of the debtor if the debtor himself failed to survive the decedent. It is uncertain why this provision is in its present form in the new Code. The use of the term "or his heirs" presents what is normally regarded as a substitutionary class, that is, the words are not considered mere words of limitation. Thus it would appear that if the debtor predeceases the creditor-decedent, the debt can be charged against the intestate share of the debtor's heirs. However, if the debtor predeceases the intestate, he is entitled to no interest against which such can be charged and therefore his heirs have no such interest either. If what was intended was to charge such debt against the issue of such a debtor who are taking a share of the creditor's estate through representation of the debtor then the wording appears inapposite. Furthermore, such a position would deny the rule adopted by the majority of American courts that such issue, while they share by representation, do so in their own right as the nearest issue of the decedent and should not, therefore, be charged with the debt of an ancestor who, by not surviving the decedent, never became entitled to inherit under the laws of intestacy.

68. Uniform Probate Code § 2-111.
70. *Id.* § 141 at 790.
The new Code also picks up a provision which will replace the provisions of the Uniform Simultaneous Death Act relating to intestacy.\(^7\) This provision requires that an heir, in order to inherit from a decedent, survive the decedent by five days.\(^2\) This provision is much more satisfactory than the Uniform Simultaneous Death Act, since it avoids the question of whether or not the deaths were in fact simultaneous.\(^3\) It also covers not only the simultaneous death situation, but the common disaster as well (at least, in those instances in which the parties die within five days of each other). The UPC provision uses a period of 120 hours rather than five days.\(^4\) Apparently the legislature thought that five days was equivalent to 120 hours and preferred it. It is somewhat difficult to understand why this particular change was made, and for purposes of uniformity it would be better to have the 120-hour period. No serious damage, however, is done to the purpose of the provision by changing it to five days so long as there is no real issue as to what constitutes a day.\(^5\)

Finally, Section 2-113\(^7\) provides that neither the husband nor the wife is entitled to either curtesy or dower. This provision is similar to that of the Uniform Probate Code, but its language is taken from the present Section 29-1-23.\(^7\)

**THE LAW OF WILLS**

The new Probate Code, following closely the format of the Uniform Probate Code, has provisions not only for execution, revocation and revival of wills, but also an important section on construction. Because of the importance of the construction provisions, that part of the new Code will be discussed. Sections on rights of the surviving spouse and omitted children will also be analyzed as an

---

73. See, e.g., Gray v. Sawyer, 247 S.W.2d 496 (Ky. 1952); Estate of Rowley, 257 Cal.App.2d 324, 65 Cal.Rptr. 139 (1967), interpreting Uniform Simultaneous Death Act § 1.
74. Uniform Probate Code § 2-104.
75. The only definition of "day" in the statutory law of New Mexico is limited to computing the legislative sessions. N.M. Stat. Ann. § 1-2-2(H) (1970 Repl.). However, there is a general section relating to computing time which provides that the first day shall be excluded and the last day included unless it falls on Sunday, in which case the following Monday is included. N.M. Stat. Ann. § 1-2-2(G) (1970 Repl.). Thus the five day period used in this section of the new Code could substantially exceed the 120 hours of the UPC. Because the interest here is evidentiary, the new Code provision should be construed to conform to that of the UPC.
77. Id. § 29-1-23 (1953).
integral part of wills law. Accordingly, the discussion which follows will be divided into four subdivisions: (1) execution of will, (2) revocation and revival, (3) construction, and (4) the omitted spouse and children.

Execution of Wills

In providing for execution of a will the new Code unfortunately departs from the text of the Uniform Probate Code (with the exception of material on competency of witnesses). Thus the first provision on execution under the new Code provides simply that any person who has reached the age of majority and is of sound mind may make a will. This is essentially the wording of Section 30-1-1 of the present New Mexico probate laws. By contrast, the Uniform Probate Code specifically refers to age 18 rather than the age of majority. While the age of majority is presently 18 in New Mexico, this tying the right to make a will to the age of majority seems unnecessarily constricting. There may in the future be reasons for changing the age of majority which have no connection with the age required for making a will.

It is in the requirements of execution, however, that one might feel the greatest disappointment. The new Code retains essentially word for word the present law on this subject. Thus it excludes the possibility of the testator acknowledging his signature after affixing it. The Code requires the witnesses to see the testator sign the will. The Code also retains the present requirements that the execution of a will be done with the witnesses and the testator all present at the same time and signing in the presence of each other. This statutory language has been interpreted, as one might expect, to place New Mexico among those jurisdictions using the "line of sight" test for determining "presence." Accordingly, it would seem that the execution of any will which is not coordinated or supervised by a legally trained person is likely to be invalid in New Mexico.

78. Id. § 32A-2-501 (N.M. Probate Code 1975).
79. Id. § 30-1-1 (Supp. 1975).
82. E.g., for protection as to contracts, criminal liability, guardianship, liquor laws, etc., none of which necessarily affects the right to dispose of property by will. In fact Uniform Probate Code § 1-201(24) presumes that "minor" may mean someone under twenty-one. The new Code defines minor merely as one who has not reached the age of majority (N.M. Stat. Ann. § 32A-1-201(23) (N.M. Probate Code 1975)).
85. Id.
In contradistinction, the Uniform Probate Code, announcing a desire to “simplify and clarify”87 the law regarding the execution of wills and to “validate the will whenever possible,”88 has greatly simplified the formalities required in execution of a will. While requiring a writing signed by the testator or some other person in his presence and at his direction, as does the New Mexico provision, it makes no requirement that the witnesses see the testator sign or that he see them sign or that they see each other sign.89 In other words, the Uniform Probate Code virtually eliminates any requirement of presence. Furthermore, the witnesses are merely required to witness any one of three acts: the signing, the testator’s acknowledgment of his signature, or his acknowledgment of the will, in order to perform their testimonial function.90 The only presence requirement that one might postulate under this provision is the natural one required for the witness to perform his function with regard to one of these three acts of the testator. This simplification of the Wills Statute by returning to an execution somewhat similar to, though even more liberal than, the Statute of Frauds of 167791 appears to be far more in keeping with today’s modern, better-educated citizenry than does the intensely legalistic formalities required under present New Mexico law and readopted in the new Code.

The restrictive effect of the new Code’s rigidly formal execution requirement is reinforced by the omission of Uniform Probate Code Section 2-503, which authorizes special treatment of holographic wills, making them valid even if not witnessed so long as the signature and the “material provisions” are in the handwriting of the testator.92 Since New Mexico has not previously given special recognition to the holographic will, this decision is not surprising. It cannot altogether be criticized either, since those jurisdictions which have permitted special treatment for holographic wills have found the subject not free from difficulties, both in terms of attempting to discover the animus testendi93 and in connection with determining whether or not the “material provisions” were in the testator’s handwriting.94 It would, therefore, seem that the decision not to give such special treatment is properly a legislative determination based

87. See Uniform Probate Code § 1-102(b)(1).
88. See Uniform Probate Code, Comment to Art. II, Part 5.
90. Id.
91. 29 Car. 2, c. 3, § 5 (1677).
92. Uniform Probate Code § 2-503. The section has been left blank in the new N.M. Code.
93. Atkinson, supra note 54, § 75 at 355.
94. Id.
on a policy of avoiding the problems created by such homemade wills. Such considerations, however, are and should be immaterial to any determination of the basic requisites for execution of formal wills.

Section 2-504 of the new Code provides for the self-proved will. Because the self-proved provisions must indicate compliance with the New Mexico execution requirements, the language of the new Code with regard to the self-proving affidavit is essentially the same as that under the present law. Section 2-506 on choice of law, however, 

95. N.M. Stat. Ann. § 32A-2-504 (N.M. Probate Code 1975). SELF-PROVED WILL. — An attested will may, at the time of its execution, or at any subsequent date, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each before an officer authorized to administer oaths under the laws of this state, or under the laws of the state where execution occurs, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

"STATE OF NEW MEXICO
COUNTY OF ____________________________

We, ______________, ______________, and ______________, the testator and the witnesses, respectively, whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he signed willingly, or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses saw the testator sign or another sign for him at his direction and, in the presence of the testator and in the presence of each other, signed the will as witness and that to the best of his knowledge the testator had reached the age of majority, was of sound mind and was under no constraint or undue influence.

__________________________________________
Testator

__________________________________________
Witness

__________________________________________
Witness

Subscribed, sworn to and acknowledged before me by ____________________________
the testator, and subscribed and sworn to before me by ____________________________
and ____________________________, witnesses, this _____ day of ____________,

__________________________________________
(Official capacity of officer)."

96. N.M. Stat. Ann. § 30-2-8.2 (Supp. 1975). Self-proved will.—An attested will may, at the time of its execution, or at any subsequent date, be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the witnesses, each before an officer authorized to administer oaths under the laws of this state, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

"STATE OF NEW MEXICO
COUNTY OF ____________________________

We, ______________, ______________, and ______________, the testator and the witnesses, respectively, whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he signed willingly or
while similar to an existing statutory provision, expands the present law by adopting most of the UPC language. The new section provides that so long as a will is in writing it is valid not only if executed under the provision of the new Code but also if validly executed either under the law of the place of execution at the time executed or under the law of the testator’s domicile either at the time of execution or at the time of death. This extends the existing provision, which refers only to the place of execution. It differs from the UPC only in that the latter does not limit the alternative to the place of execution to the testator’s domicile but includes also the jurisdiction where testator “has a place of abode or is a national.”

This difference in wording appears to be relatively insignificant so long as the word “domicile” is liberally construed.

The new Code does adopt a much more liberal section regarding the competency of witnesses. It accepts intact Section 2-505 of the Uniform Probate Code which provides that a person who is “generally competent to be a witness” can be a witness to a will and specifically states that “a will or any provision, thereof, is not invalid because the will is signed by an interested witness.” This latter part removes a number of problems from the agenda of any probate court dealing with a will. It eliminates first the issue as to whether a witness has a sufficient pecuniary benefit to be regarded as directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, saw the testator sign and in the presence of the testator, at his request and in the presence of each other signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by ________________, the testator, and subscribed and sworn to before me by ________________ and ________________, witnesses, this ______ day of ______,

(SEAL) (Signed) _____________________________

(Official capacity of officer)."

98. Id. § 30-1-10 (1953).
100. Which is not defined under the new Code.
102. Uniform Probate Code § 2-505(a).
103. Uniform Probate Code § 2-505(b).
“interested.” It avoids the danger that an inadvertent use of an interested witness or the spouse of an interested witness might render the will invalid. Finally it makes unnecessary employment of any so-called “purging statute” with the problems attendant thereon. This provision is a substantial change from present law, since the present New Mexico statute says that “persons becoming heirs or legatees” cannot be witnesses to a will. The present statute has no purging section and, therefore, use of a witness with a possible interest as either an heir or legatee could result in inadvertently voiding the will. The purpose for adopting such a clause is, as the comment to the Uniform Probate Code section makes clear, not to foster the use of interested witnesses but to avoid disqualifying a will by the frequently innocent use of some potentially interested witness. It is unlikely that a person desiring to defraud or unduly influence the testator would be so stupid as to use an interested witness, but if by chance this should occur, the witness can still be challenged at probate. Any substantial gift to a witness may well raise doubts as to his credibility in the eyes of the probate judge or jury. Thus the UPC approach is to eliminate the assumption of the present rule that an interested witness is necessarily incompetent even where no fraud, under influence or duress is shown. While this posture creates a risk that the testator may be imposed upon, there appear to be far greater risks under the present law that a perfectly good will will be denied validity because of the inadvertent use of a witness who may be “interested.”

Thus it can be seen that with the exception of the provision dealing with the interested witness and the broadening effect of the choice of law provision, the new Code retains the ritualistic formal requirements of present New Mexico law concerning execution of wills. It might be pointed out, however, that the new Code does eliminate the present rather strange provisions under the current law permitting the testator to authorize someone else to write his will for him. Such repeal, while commendable, is in keeping with the

— Atkinson, supra note 54, § 65 at 308.

— Id.

— Id., e.g. Ky. Rev. Stat. § 394.210(2). If a will is attested by a person to whom, or to whose wife or husband, any beneficial interest in the estate is devised or bequeathed, and the will cannot otherwise be proved, such person shall be deemed a competent witness; but such devise or bequest shall be void, unless such witness would be entitled to a share of the estate of the testator if the will were not established, in which case he shall receive so much of his share as does not exceed the value of that devised or bequeathed.

apparent policy of the new Code to insist upon a very formal execution ceremony and with its refusal to give special consideration to holographic wills. While the new Code refuses to promote the purpose of the Uniform Probate Code to make the various state laws more uniform,\textsuperscript{110} it does, at least by adopting the essential portions of the choice of law section, maintain a reasonable regard for other states’ attempts to obtain such uniformity.

\textit{Revocation and Revival}

The material on revocation in the new Code, unlike that dealing with execution, conforms almost word for word to the provisions of the Uniform Probate Code. Thus the new Code, like the UPC, contains two sections specifically dealing with revocation.\textsuperscript{111} The first of these is the traditional section approving revocation by a subsequent testamentary instrument or by physical act.\textsuperscript{112} It specifically provides that a will or any “part thereof” can be revoked 1) by a subsequent will which expressly or impliedly revokes the prior will or part, or 2) by an instrument in writing executed with the same formalities that are required for the execution of a will which “distinctly refers” to the will and revokes it, or 3) by being “burned, torn, cancelled, obliterated, or destroyed” with the intent to revoke by either the testator or someone else in his presence and by his direction. The wording here is identical to that of the Uniform Probate Code except for the provision dealing with revocation by a subsequent instrument which is not a will.\textsuperscript{113} There was no need for such in the revocation section in the Uniform Probate Code because section 1-201 defines “will” to include “a testamentary instrument which merely appoints an executor or revokes or revises another will.” Since the new Code contains the same definition, it seems unnecessary to add this special provision. In any event, the new Code makes no change in present New Mexico law with the exception of adding the word “torn” to the list of physical acts by which a will

\begin{footnotesize}
\begin{itemize}
\item making a will may empower and authorize any other intelligent and well qualified person to make his last will and testament, and to dispose of his property, but in granting said power, the same qualifications required for the validity of a will and said power shall be inserted therein.
\item 30-1-3. Authority limited by specified powers.—The person receiving said authority shall not go beyond the powers therein specified, in reference to the institution of heirs, legacies, and nothing more.
\item 110. The new Code, e.g., fails to enact that part of Uniform Probate Code (§ 1-102) which refers to uniformity as a purpose of the Code (compare Uniform Probate Code § 1-102(5) with N.M. Stat. Ann. § 32A-1-102 (N.M. Probate Code 1975)).
\item 112. Id. § 32A-2-507.
\item 113. Uniform Probate Code § 2-507.
\end{itemize}
\end{footnotesize}
may be revoked. It does, however, by adopting the UPC's language, make clear that partial revocation by physical act will be recognized in New Mexico and affirms the judicial interpretation in New Mexico that a subsequent will may revoke by inconsistency even though it contains no express revocation clause.

The second section provides rather comprehensibly for revocation by divorce or annulment. It states that in the event of divorce or annulment ending the marriage, any provision in favor of the former spouse, whether it be dispositive, nominative of any fiduciary position or the exercise of any power of appointment in favor of such spouse, shall be regarded as having been revoked, and the former spouse shall be treated as if he or she had predeceased the testator for purposes of interpreting the remainder of the will. It also provides expressly that if the parties remarry, the provision in favor of the spouse is revived. It concludes by providing that no other change of circumstance will revoke a will.

This new section clearly changes present New Mexico law. The present New Mexico statute provides for revocation by divorce but makes no reference to annulment. Nor does it provide how provisions in favor of the divorced spouse will be treated for purposes of construction. Accordingly, the new provision is more comprehensive in its coverage and, particularly in view of New Mexico's statute on revival, does provide for the not infrequent situation where the divorced parties remarry. The present law also provides that if a testator marries after the execution of a will, as to the surviving spouse the testator is deemed to have died intestate. The surviving spouse or the descendants of the surviving spouse are then entitled to that portion of the estate which the spouse would have received if the testator dies intestate, and all the other devises and bequests are reduced proportionately. This provision is not included in the revocation section under the new Code but, as will be seen later, there is a somewhat similar provision for the omitted spouse in Part 3.

118. Id. § 30-1-7.1(B) (Supp. 1975).
119. Id. § 30-1-7.1(A).
120. See infra at text accompanying notes 168 through 171.
In dealing with revival the new Code rejects the UPC's provision, which is essentially an adoption of the ecclesiastical view. Instead it retains, with some change in wording, the present provision on this issue. The only change from the present provision is that in order for a prior will to be revived after having been revoked, the validity of the prior will must be acknowledged in writing. (The present New Mexico statute merely requires that the first will be acknowledged.) It is not entirely clear what is meant by "acknowledged in writing." Does this refer to formal acknowledgement before a notary public? If so, does it preclude revival by reexecution of the first will or by republication by codicil? Would it permit revival by a simple written statement by the testator acknowledging his prior will as once more valid? In short, the language referring to acknowledgment is inappropriate in dealing with wills. It would have been better had the new Code provided that revival can be accomplished only by reexecution or republication by properly executed codicil than to have left in this peculiarly inapt language.

More importantly, however, it seems unfortunate that the UPC provision was not adopted because it provides that revival is a question of the testator's intent, i.e., if in revoking the subsequent will the testator indicated an intent to revive the first, it will be revived. The UPC places the burden of proof of showing the intent upon the proponent of the prior will. It provides that the first will remains revoked unless "it is evident from the circumstances" or from the testator's declarations that he intended the first will to be revived. Thus, the UPC again is more concerned with validating the acts of a reasonably intelligent person than with surrounding the validity of a will with too many formal requirements. It can be seen

122. Uniform Probate Code, § 2-509. [Revival of Revoked Will.]
   (a) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by acts under Section 2-507, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.
   (b) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part, is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

123. Atkinson, supra note 54, § 92 at 474.
125. Id. § 32A-2-509 (N.M. Probate Code 1975).
126. As was provided in the English Stat. of Wills of 1837–7 Wm. IV and 1 Vic., c. 26 § 20 (1837).
then that while as to revocation the new Code adopts the UPC’s positions, it discards them as to the question of revival.

_Construction of Wills_

A. Article II Part 5

Article II Part 6 of the new Code contains the provisions relating to construction of wills and to the problems of lapse, ademption and satisfaction, but the last four sections of Part 5 are closely related to construction and are, therefore, included in this part of the discussion. The first three are effectively codifications of the common law doctrines of incorporation by reference, acts of independent significance, and the material statutory provision of the Uniform Testamentary Additions to Trust Act. The fourth section presents an extended version of incorporation by reference.

Section 2-510 is the restatement of incorporation by reference. It permits incorporation of any existing writing if the will manifests such intent and adequately identifies the writing. Under existing law New Mexico has neither statutory provisions nor judicial decisions regarding the doctrine. On the other hand, there is no reason to suppose that New Mexico would not permit incorporation by reference in view of Section 21-3-3 of the present New Mexico statutes, which specifically provides that the common law shall be the law of practice and decision. Of course, one could argue that incorporation by reference is not universally accepted, since there are still some jurisdictions which have refused to adopt it, but since it is definitely a majority attitude, it would be surprising if New Mexico rejected it judicially. At any rate, the provision in the new Code makes it clear that incorporation by reference is available in the state.

Similarly, New Mexico has neither statutory material nor judicial decisions which determine the effect of acts of independent significance. However, this is a common law doctrine which, unlike incorporation by reference, appears to have no enemies. Again it is more than likely that Section 2-512 would be regarded as a codification of existing common law. Section 2-511 is a copy of Section 1 of the Uniform Testamentary Additions to Trust Act. New Mexico

128. _Id._ § 81 at 394.
129. Uniform Testamentary Additions to Trust Act § 1.
131. _Id._ § 21-3-3 (Repl. 1970).
132. _See_ Atkinson, _supra_ note 54, § 80 at 385.
133. _Id._ § 81 at 394.
adopted this Act in 1965, and, therefore, this section makes no change in the present law in New Mexico.

The last of the four sections, 2-513, represents a departure from traditional wills law. While essentially an extension of incorporation by reference, it clearly permits post-execution changes in the disposition of certain property. It is related to the incorporation by reference doctrine in that it requires both a writing and a reference to the writing in the will. It extends that doctrine by permitting the writing to be prepared or altered after the execution of the will. This extension is limited, however, in that the writing must be in the handwriting of the testator or signed by him and the property to be disposed of by the writing is limited to tangible personal property. Even this constraint is further limited to exclude items "used in trade or business." To underline the property limits, the section excludes "money, evidences of indebtedness, documents of title, and securities." It also excludes items of tangible personality "otherwise specifically disposed of by the will."

Obviously, New Mexico has no comparable statutory or case law, and thus this provision presents a new theory of operation. While it may at first appear startling to practitioners, it is not intended to be

135. Id. § § 33-7-1 through 33-7-3 (Supp. 1975).

33-7-1. Short title.—This act [33-7-1 to 33-7-3] may be cited as the Uniform Testamentary Additions to Trusts Act.

33-7-2. Testamentary additions to trusts.—A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons, including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator, regardless of the existence, size or character of the corpus of the trust. The devise or bequest shall not be invalid because the trust is amendable or revocable; or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator’s will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's will, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

33-7-3. Uniformity of interpretation.—This act [33-7-1 to 33-7-3] shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.
a prescription for normal procedure, but rather to act as a safety valve for those testators who do in fact employ such means to change or complete their wills. In view of the limitation on the kinds of property disposed of in this fashion, the risk appears minimal. Thus, in these last four provisions of Part 5, the new Code appears merely to clarify and extend the present New Mexico law with regard to completing a will by actions *de hors* the will.

B. Article II Part 6

This part of the new Code, derived almost exclusively from the UPC, is designed to clarify various problems arising out of the construction of wills. In many cases it is merely declaratory of existing law, while in others it either opts for one of the several conflicting extant theories or creates a new and hopefully more satisfactory solution. Sections 2-603\(^{136}\) and 2-604\(^{137}\) are examples of codification of existing law. The former provides that a clear expression of intent by the testator will override any of the succeeding provisions on construction. This is a clear statement of the existing law on statutory rules of construction\(^{138}\) and appears to be included primarily to avoid any question and to obviate the necessity of so stating in each of the separate sections. The latter similarly codifies the existing rule of construction regarding after-acquired property: it is passed by the will. Section 30-1-1 of the present New Mexico Probate Code\(^{139}\) provides that the testator “may dispose by will of all his property.” While this does not specifically refer to after-acquired property, and New Mexico has been listed as a state having no specific provision on this matter,\(^{140}\) the adoption of Section 2-604 in New Mexico does not overrule or alter any existing laws. Since New Mexico has no provisions comparable to any of those which follow Section 2-603, there is no existing authority in New Mexico. Even if the new provisions do not codify New Mexico law, neither do they overturn any existing judicial or statutory provisions.

Of the remaining nine provisions, four represent a choice between competing theories, three are first attempts at solving some existing construction problems by statute, and two can be classified as devising new and more comprehensive schemes to replace existing statutory law. Looking at the last first, these two provisions cover 1) the problem of whether a devisee has survived the testator and 2) the

\(^{136}\) Id. \(\S\) 32A-2-603 (N.M. Probate Code 1975).
\(^{137}\) Id. \(\S\) 32A-2-604.
\(^{138}\) See Atkinson, *supra* note 54, \(\S\) 146 at 807.
meaning of technical words used to describe blood relationships. Thus Section 2-601\textsuperscript{141} is designed to replace a part of the Uniform Simultaneous Death Act.\textsuperscript{142} (New Mexico adopted the Uniform Simultaneous Death Act in 1959.)\textsuperscript{143} Instead of attempting to deal only with the evidentiary problems created by simultaneous death, this section requires that any devisee who fails to survive the testator by five days shall be deemed to have predeceased him, unless the testator makes some provision in the will regarding what constitutes survivorship. This provision is a necessary companion to Section 2-104\textsuperscript{144} dealing with intestacy. Again, like 2-104 it differs from the UPC in using five days instead of 120 hours.

Section 2-611\textsuperscript{145} replaces sections in many state statutes attempting to solve the problem of whether adopted persons are "issue," "next-of-kin," etc., as those and similar generic terms are used in a will. The section, however, goes beyond the problem of adopted persons and includes halfbloods and illegitimates. It provides that such persons bear the necessary relationship if they would do so under the rules for determining such relationships for purposes of intestate succession under the Code.\textsuperscript{146} If in effect they are members of the class or bear the designated relationship for purposes of intestate succession, under the Code halfbloods and adopted persons are to be treated the same as fullbloods and natural children for purposes of intestate succession,\textsuperscript{147} these two classes are clearly completely covered. The illegitimate is covered for maternal inheritance in all cases and for paternal inheritance if certain steps are taken by the putative father.\textsuperscript{148} Section 2-611 of the UPC, however, requires not only the action by the putative father required for purposes of intestate succession, but also requires that the illegitimate be openly and notoriously treated by the father as his child. Thus, it avoids the possibility of including an illegitimate within a class gift where the testator was unaware of the relationship because of the ability of a father to legitimize a child under proceedings relatively secret vis-a-vis the rest of the world. Under the new Code, however, such requirement is omitted. Under existing law the New Mexico Supreme Court has already ruled that adopted children are included

\textsuperscript{142} Uniform Simultaneous Death Act §§ 1 and 2.
\textsuperscript{144} Id. § 32A-2-104 (N.M. Probate Code 1975).
\textsuperscript{145} Id. § 32A-2-611.
\textsuperscript{146} Id. § 32A-2-109.
\textsuperscript{147} Id. §§ 32A-2-107, 32A-2-109(A).
\textsuperscript{148} Id. § 32A-2-109(B).
in the term "lawful children" used in the will of someone other than the parent.\textsuperscript{149} The extension of such a construction to illegitimates and halfbloods would not appear to be a radical departure from existing law in New Mexico, though one might well prefer the language of the UPC as to illegitimates. At least there is no existing law to be changed by the adoption of this new provision.

The three truly new statutory provisions relate to increase, ademption and satisfaction. Section 2-607 provides rules for dealing with some of the problems raised by specific bequests of stocks and bonds. While the section makes no attempt to define specific bequest, it does clarify the effect of various corporate changes upon such bequests. First, there is a restatement of the common law rules that the legatee is entitled to as much of the devised securities as remain at death.\textsuperscript{150} It provides that the legatee is also entitled to "any additional or other securities" of the same corporation received as a result of action initiated by the corporation, with the exclusion, however, of securities acquired through exercise of option rights. Thus, the legatee would receive additional shares acquired by the testator through stock splits, stock dividends (whether of the declaring corporation or of a non-declaring corporation) and company-called conversion of convertible debentures into stock. The next part of the section grants to the legatee securities received by virtue of merger, reorganization, etc. It provides further that the legatee will receive any securities acquired through reinvestment plans of regulated investment companies. Finally, it denies to the legatee any other distributions not covered, thus clearly codifying the common law rule as to cash dividends.\textsuperscript{151} Essentially the provisions here are designed to harmonize with the revised Uniform Principal and Income Act (adopted by New Mexico in 1969)\textsuperscript{152} and to avoid the otherwise perplexing problems as to the conflict regarding increase and ademption problems dealing with securities in general.\textsuperscript{153} While this provision will most probably require the services of an accountant to trace the activities of corporations vis-a-vis specific stock bequests, it does furnish a rule which is relatively clear, certain and probably in keeping with the testator's intent. If it is not, the testator can make appropriate provision in his will.

The primary section on ademption is Section 2-608. In this section

\textsuperscript{150} Atkinson, \textit{supra} note 54, § 134 at 745.
\textsuperscript{151} \textit{Id.} § 135 at 749-50.
\textsuperscript{153} See \textit{Note}, \textit{Rights to Stock Accretions Which Occur Prior to Testator's Death}, 36 Albany L. Rev. 182 (1971); Atkinson, \textit{supra} note 54, §§ 134, 135 at 741, 749.
the new Code attempts to change the broad common law rule\textsuperscript{154} that a testamentary gift of specific property fails completely whenever the thing given no longer exists in the testator’s estate at the time of his death. First, it provides for ademption caused by the actions of a conservator\textsuperscript{155} or guardian, and second, ademption resulting from both actions by the testator and actions by reason of \textit{force majeure} or acts of God.\textsuperscript{156} Subsection A provides that the devisee of any property specifically devised which is sold by a conservator or for which he receives an award in a condemnation proceeding or insurance proceeds resulting from fire or casualty loss is entitled to a general pecuniary award equal to the net sale price from the condemnation award or the proceeds of the insurance. The only exception to this rather generous provision arises if the testator ceases to be under disability as a result of an adjudication and survives that adjudication by at least one year. Under those circumstances, the devisee is limited to his rights under subsection B. No cases were found dealing with problems of ademption arising from acts of the conservator in New Mexico, and therefore it is uncertain what rule New Mexico courts might have adopted, but this particular provision goes beyond even the most liberal of the present judicially adopted solutions.\textsuperscript{157}

Subsection B, which applies in all other cases, in effect eliminates ademption in four cases where ademption would have applied under the common law. The first case concerns the sale of specifically devised property by the testator before death. Here the new Code gives to the legatee the balance of any purchase price owed to the testator. Application of the traditional rule ordinarily resulted in complete ademption of any legacy or any devise of real property if that property was subject to a binding contract of sale prior to the testator’s death, thus denying the legatee the balance of the sales price.\textsuperscript{158} That rule had been adopted in New Mexico,\textsuperscript{159} and, therefore, the new provision changes present New Mexico law. The next two subsections cover condemnation and fire or casualty losses. In all such cases the new Code awards to the specific legatee any unpaid balance of any condemnation award or any insurance proceeds received on fire or casualty loss which remain unpaid at the time of death. There appear to be no New Mexico cases directly in point

\textsuperscript{154} See Atkinson, supra note 54, § 134 at 741.
\textsuperscript{156} Id. § 32A-2-608(B).
\textsuperscript{157} Which only grant to the devisee the remaining proceeds on hand at testator’s death. See 3 Amer. Law Prop. § 14.13 (1974).
\textsuperscript{158} Atkinson, supra note 54, § 134 at 744-45.
\textsuperscript{159} Gregg v. Gardner, 73 N.M. 347, 388 P.2d 68 (1963).
here, but this does change the traditional common law approach in these two situations. The final case concerns property which is owned by the testator at his death as a result of a foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation. The property is given to the legatee in place of the obligation. Here, too, there appear to be no New Mexico cases in point. The primary result, then, of Section 2-608 is to change the common law approach to the issue of ademption and to give to the legatee what it assumes the testator would have wanted him to have. It is to be noted that except in the case of actions taken by a conservator, the change does not guarantee to the legatee that he will receive the equivalent value of his legacy, but rather provides that he is to receive property owned by, or owed to, the testator at the time of his death. Thus, if the entire amount has been paid prior to the testator's death, complete ademption still occurs in accordance with traditional common law rules.

The last of the three new statutory provisions of the new Code covers satisfaction, i.e., the loss of all or part of a bequest in a will by receipt of an inter vivos gift intended by the testator as a whole or partial prepayment of the bequest. While it makes no attempt to change the basic common law requirements for satisfaction, the provision does tend to eliminate the necessity of worrying about them. It requires for satisfaction, as it did for advancements, written proof. Any gift intended as a satisfaction in whole or in part must be so proven by a contemporaneous writing by the testator, a provision for deduction in the will, or a writing by the legatee acknowledging the gift to have been a satisfaction. The section provides that property given in partial satisfaction will be valued as of the date of enjoyment by the legatee or the date of the testator's death, whichever occurs first. The New Mexico case law dealing with satisfaction has applied the common law rules. Thus, there will be some change in existing law because of the writing requirement.

The remaining provisions accept what many regard as the "better rule" with regard to lapse, exoneration and residuary exercises of powers of appointment. Section 2-610 specifically adopts the majority rule by providing that a general residuary clause in a will shall not exercise a power of appointment unless there is either a specific reference to the power or there is some indication of an

---

160. Atkinson, supra note 54, § 134 at 745.
161. Id. § 133 at 737.
intent to include the property covered by the power. As the comment of the UPC to Section 2-610 states, the reasons for this particular provision are that it enunciates the present majority rule in the United States and that most powers of appointment today are created in marital deduction trusts where the intent of the testator is clearly that the property pass to the takers in default in the absence of an express exercise by the surviving spouse. Under the minority rule, a residuary clause would exercise any general power of appointment, a result which could easily result in disaster both in terms of the overall tax impact and the ultimate property disposition. Because there is no New Mexico case law on this issue, the adoption of this provision eliminates existing uncertainty as to the attitude of the New Mexico courts should the issue arise.

Section 2-609 provides for a reversal of the common law rule of exoneration. It provides that a devise of any property subject to a security interest passes to the devisee subject to that interest. The devisee is not entitled to have the interest removed by payment of the debt out of the general assets of the estate. The provision makes clear that the nonexoneration rule will apply regardless of a general direction to pay debts. Again, there is no New Mexico case law in point, but New Mexico's former adoption of the common law rules would tend to indicate that the new provision would, by changing the common law rule, change existing New Mexico law.

The lapse provisions, §§ 2-605 and 2-606, establish rules both for avoidance of lapse and for disposition in the event of unavoidable lapse. Since New Mexico is one of the very few states in the Union which has no anti-lapse statute, adoption of this provision, which is almost identical to the UPC provision, is a substantial change from existing law. The provision is a liberal one in that it protects any devisee "who is related to the testator by kinship." However, it differs from the Uniform Probate Code section, which limits the protected devisees to grandparents or issue of grandparents. If any such protected devisee predeceases the testator leaving issue who survive the testator, such issue would take the gift devised to the deceased legatee. The provision also covers the void bequest by

165. Comment, Uniform Probate Code § 2-610.
167. Atkinson, supra note 54, § 137 at 764.
168. See generally 6 Bowe-Parker, Page on Wills § 52.20 (1962).
169. Rees, supra note 140, at 899.
171. It is this combination of limiting the protected devisees to relatives of the testator and the substituted takers to issue of the devisee that lead this writer to refer to this part of
providing that the anti-lapse section applies regardless of whether the devisee predeceased the testator or predeceased execution of the will. In addition to the usual anti-lapse provisions, the new Code provision also provides guidance on what might be termed some of the peripheral anti-lapse issues. First, the provision is made applicable to class gifts. Second, representation is provided for in the event some of the issue of the devisee are of unequal degree. Finally, the requirement of survivorship is again defined to include the five-day period established in Section 2-601. Not only has New Mexico had no anti-lapse statute, but there is no New Mexico case law on the issue of lapse. Accordingly, this provision adds a new dimension to existing New Mexico law. It should also be noted, as stated in the comment to the UPC section, that because of the definitional provisions of Part I of the Code, the word “issue,” as used with regard to the substitutional takers, includes both adopted persons and those illegitimates who are entitled to inherit under the intestate provisions.

Section 2-606 concerns itself with disposition of a legacy which lapses despite the anti-lapse statute. Subsection A provides that such a lapsed legacy shall become part of the residue. Subsection B deals with the problem of a lapse in the residue where the residue is bequeathed to two or more persons. Here the new Code provides that the share shall pass to the other person or persons proportionately. Thus Subsection A restates the traditional common law view on the disposition of lapsed legacies. Subsection B, on the other hand, amounts to an adoption of the so-called “residue of a residue” rule. While probably still a minority rule in this country, it is regarded as the one that most likely effectuates the testator’s desires. The majority rule requires a partial lapse in the residuary to pass by intestacy unless the residuary legatees are members of a class or can be classified as joint tenants. Since the testator intends that the residuary dispose of the remainder of his estate, the majority rule seems clearly erroneous. Again there is no case law on this point in New Mexico, and therefore the adoption of this section overrules no existing case law.

the new Code as adopting “the better rule.” In establishing an anti-lapse provision as a means of effectuating the testator’s intent, such limitations seem most appropriate to such presumed intent. Thus it is unlikely the testator would desire a substituted gift which he did not specifically provide except in the case of his relatives and their issue.

173. Atkinson, supra note 54, § 140 at 784-85.
174. Id.
175. Uniform Probate Code § 2-301.
Omitted Spouse and Children

In Article II Part 3 of the new Code provision is made for a surviving spouse and for children who are inadvertently omitted by the testator in his will. Again, the provisions are essentially those of the Uniform Probate Code with, however, one important difference. As to the omitted spouse, Section 2-301 provides that if a testator fails to provide in his will for a surviving spouse who married him after the execution of the will, the omitted spouse is entitled to an intestate share unless it appears from the will that the omission was intentional. The Uniform Probate Code makes an additional provision that if the testator provided for the spouse by transfer outside the will with intent that the transfer be in lieu of a testamentary provision (and such intent can be shown by statements of the testator, from the size of the transfer or by any other parol evidence) the surviving spouse is not entitled to an intestate share. The New Mexico provision, by omitting the inter vivos transfer, gives to the surviving spouse the right to an intestate share if omitted unless the will itself shows that the omission was intentional. The second part of the section provides that in satisfying any share to which the wife might be entitled under this provision, the devisees in the will abate in accordance with the provisions of § 3-902 of the Code, which is the general provision on abatement.

This provision on the omitted spouse is similar to the present Section 30-1-7.1. The latter, however, deals with revocation and provides that whenever there is a marriage subsequent to making a will, as to the surviving spouse the testator is deemed to have died intestate. This provision was strictly construed in In re Graef's Will by the New Mexico Supreme Court. In that case the testator had made a will leaving all his property to his fiancee. He then married the fiancee, and after his death his children argued she had no rights under that will: since the statute was absolute, she was entitled only to an intestate share. The majority of the court, adopting the position of the children, strictly construed the statute, finding it clear and unambiguous. The minority, interpreting the statute in accordance with its purpose of protecting the surviving spouse, rejected applying the statute so as to reduce her share. The Court's decision reduced the wife's rights in the estate of her husband from the whole to one fourth, since the marriage did not last

176. See discussion as to similar statutory provisions in Atkinson, supra note 54, § 36 at 142-43.
long enough for there to be community property. Under the new Code the result in that case would have been different, since the new provision is not only designed for the protection of the surviving spouse but clearly entitles her to an intestate share only if she was unintentionally omitted from the will.

The new Probate Code makes provision for the child who is omitted by the will in either of two circumstances: (1) where the child was born or adopted before or after the execution of the will and not provided for therein,\(^1\) and (2) where the child was living at the time of the execution of the will but thought by the testator to be dead.\(^1\) In the second case, the child, so long as mistakenly assumed to be dead, receives a share in the estate equal to that which he would have received if the testator had died intestate. In the first case, when the child is born before or after the will has been executed, he is also given an intestate share unless (a) it appears from the will that the omission was intentional, or (b) when the will was executed the testator had one or more children and left "substantially" all of his estate to the parent of the omitted child. It appears that the first exception, that is, that the omission was intentional, must be shown on the face of the will.\(^1\) The Code makes no particular provision for posthumous children other than to provide that they are to inherit as if they had been born in the lifetime of the decedent for purposes of intestate succession.\(^1\) The reason for this is probably that the basic provision providing for after-born children clearly includes posthumous children, and thus there is no need for a separate section.

The new Code makes a substantial change in New Mexico law. The present law contains two statutory provisions covering descendants of the testator who had been omitted from the will. The first of these deals solely with posthumous children and provides that any such posthumous child is entitled to his intestate share if "unprovided for by the will."\(^1\) The second provides for any child or descendants of any children omitted from a will and says that any such child or descendant not "named or provided for in such will" shall be entitled to an intestate share as if the decedent had died

---

\(^1\) 181. Id. § 32A-2-302(B).
\(^1\) 182. It being assumed (1) that a child believed dead was unintentionally omitted and (2) that if the surviving parent was given the bulk of the estate, the testator probably intentionally omitted to provide for the children specifically, leaving it to the surviving parent to do so. See discussion on similar provisions as to omitted spouse and material in Atkinson, supra note 54, § 36 at 142-43.
\(^1\) 184. Id. § 29-1-16 (Supp. 1975).
without a will. Both sections provide that the will is not otherwise revoked but that the other legatees will contribute a proportional part to make up the share of the omitted or posthumous child.

While there is a reference in the omitted child provision to the possibility of the child being born after the making of the will, decisions of the courts have not limited the provision to such afterborns, but have included any child or the descendant of any child who was omitted by the testator from appropriate provision. New Mexico courts have interpreted the section as being primarily intended to provide for unintentional omission by a testator. Accordingly, they have not required that the testator necessarily mention the omitted child or provide for him in the will so long as it is clear from extrinsic evidence that the omission was not intentional. In re McMillen's Estate held that a son of the testator who had been omitted from the will was not entitled to take under the omitted child section, since extrinsic evidence indicated that the decedent had had to pay support for the son following a divorce from the mother. Apparently the court felt that the decedent's omission of the son from the will was clearly not unintentional. Similarly, the courts have made it clear that it is not necessary to mention the relationship of child or descendant in the will in order to make it clear that an omission was not unintentional. In Mares v. Martinez a bequest was made to the purported omitted child by name rather than by relationship. The court held that this was a sufficient mention, and therefore the child was not entitled to an intestate share as an omitted child. It was not necessary to mention the relationship in order to satisfy the statute.

The language of the new Code, while still based on the unintentional omission concept, appears to require, as previously stated, that such intentional omission appear from the face of the will. In view of In re McMillan's Estate it is possible that the Supreme Court of New Mexico will again interpret the new Code provision to permit use of extrinsic evidence to show that the omission was intentional. The definition of "child" in the definitional sections of the

185. Id. § 30-1-7 (1953).
189. 12 N.M. 31, 71 P.1083 (1903).
190. 54 N.M. 1, 212 P.2d 772 (1949).
191. See note 182, supra, and discussion thereto.
192. 12 N.M. 31, 71 P. 1083 (1903).
new Code\textsuperscript{193} does not include grandchildren and other descendants. Accordingly, there is no longer any right of an omitted descendant other than a child to receive an intestate share, except that the issue of an omitted child who predeceased the testator take his or her share. Further, the new Code makes an exception to the right to take the intestate share if the omitted child is also a child of the surviving spouse and the surviving spouse receives the bulk of the estate under provisions of the will. This provision is of great importance in that it avoids upsetting the will in favor of an omitted child when the bulk of the estate has been passed to the surviving parent of that child. It also permits the testator to make small memento bequests to one or more, but not all, of his children without running the risk of application of the omitted child provision.

This new Code section specifically refers to adopted children, clearly including them within the scope of the omitted child section. New Mexico had already achieved the same result by defining "child" under the existing omitted child section,\textsuperscript{194} so this represents no real change in the philosophy of existing laws. Present New Mexico law also includes the illegitimate child who had been legitimated or acknowledged in accordance with existing statutory provisions.\textsuperscript{195} The definition, again, of "child" under the new Code\textsuperscript{196} achieves the same results.

In summary, the new section regarding the omitted child is now limited, to children of the decedent, whether naturally born, illegitimate or adopted; but it excludes other omitted descendants of the testator. It is for the benefit of any children who are born, adopted or recognized before or after the execution of the will. Finally, the right of the omitted child to take an intestate share, however, is denied if the child is a child of a surviving spouse to whom the bulk of the estate is left under the will, except in the case of the child omitted because believed to be dead. This is essentially the Uniform Probate Code scheme. In fact, the only difference from the Uniform Probate Code lies, as in the case of the omitted spouse, in failure to adopt the third qualifying provision, which would have denied the omitted child a right to an intestate share if there had been a lifetime transfer by the decedent to such child intended to be in lieu of a testamentary provision, and in extending protection to children born before as well as after the execution of the will.

\textsuperscript{194} Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308 (1946); Mares v. Martinez, 54 N.M. 1, 212 P.2d 772 (1949).
\textsuperscript{195} Sanchez v. Torres, 35 N.M. 383, 298 P. 408 (1931); In re Gossett's Estate, 46 N.M. 344, 129 P.2d 56 (1942).
CONCLUSION

From the above discussion one can see that the new Code is truly a major and vital improvement over the present laws in the areas of both intestate succession and wills. While one may regret the choices made by the legislature regarding the rules on execution and ultimate succession under intestacy, the new Code will substantially improve probate practice by clarifying and codifying the substantive law in this area. Important gaps and uncertainties in probate law in New Mexico have been closed or clarified by the provisions of the new Code, thus easing the burden on the lawyer and the cost to the client. It is to be hoped that in the future the New Mexico legislature will be more concerned with the concept of uniformity and therefore more willing to adopt in toto the textual content of the Uniform Probate Code in this area. For the present, however, one is compelled to applaud the efforts and achievement of the legislature represented by the new Code.