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INSTITUTE OF GOVERNMENT
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CHAPEL HILL

SPECIAL REPORT OF THE GENERAL STATUTES COMMISSION ON AN ACT TO REWRITE THE INTESTATE SUCCESSION LAWS OF NORTH CAROLINA

LEGISLATIVE LIBRARY

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INSTITUTE OF GOVERNMENT
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Chapel Hill

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Reprinted June, 1960, with the consent of the General Statutes Commission, by the Institute of Government for the use of public officials throughout the State.

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LETTER OF TRANSMITTAL

TO THE GENERAL ASSEMBLY OF NORTH CAROLINA:

In the regular biennial report of the General Statutes Commission to the 1959 General Assembly, dated February 7, 1959, it was stated that three Commission bills, proposed for action by this General Assembly, would be the subject of a separate report.

The three bills were prepared by a special committee composed of Mr. Fred B. McCall, Professor of Law, University of North Carolina School of Law; Mr. Bryan Bolich, Professor of Law, Duke University School of Law; and Mr. Norman A. Wiggins, Professor of Law, Wake Forest College School of Law. The bills are as follows:

(1) An act to rewrite the intestate succession laws of North Carolina;

(2) An act to provide for the creation of and to limit the conveyance of family homesites; and

(3) An act to rewrite the statutes on dissent from wills.

With this letter of transmittal, the Commission submits for consideration by the General Assembly:

(1) A report by the special drafting committee to the General Statutes Commission, setting out the background of this work and explaining the same in general terms; and

(2) A copy of each of the three bills, together with the drafting committee's comments thereon.

In submitting this special report, the General Statutes Commission wishes to: make grateful acknowledgment of the outstanding services of the drafting committee in undertaking and completing this difficult project; recommend the enactment of each of these three bills; and suggest that sufficient copies of this report be printed for distribution to interested persons throughout the State.

This the 16th day of February, 1959.

Respectfully submitted,

Robert F. Moseley, Chairman
Frank W. Hanft, Vice Chairman
James H. Pou Bailey
E. C. Bryson
J. W. Hoyle
R. G. Kittrell, Jr.
Buxton Midyette
E. K. Powe
James A. Webster, Jr.

Thomas L. Young, Revisor of Statutes, Ex officio Secretary

REPORT OF DRAFTING COMMITTEE TO THE GENERAL

STATUTES COMMISSION OF THE STATE OF NORTH CAROLINA -

Mr. Robert F. Moseley, Chairman

Dear Mr. Moseley:

In the latter part of the year 1957, the General Statutes Commission, cognizant of the great need for a new and up-to-date Intestate Succession Act for North Carolina, requested Professors Fred B. McCall of the University of North Carolina Law School, Bryan Bolich of Duke University Law School, and Norman A. Wiggins of Wake Forest College Law School to serve as a special committee to draft such a statute for and in behalf of the Commission, and, subject to the approval of that body, to be submitted to the 1959 General Assembly for enactment into law.

Pursuant to this request, the drafting committee agreed to undertake this task. It met first in Chapel Hill on November 8, 1957, and has since held some twenty meetings. As it began its work, your committee was fully cognizant of the fact that North Carolina needs a modern intestate succession act for the reason that, with but slight modifications in the law, North Carolina still determines the descent of real property to the heirs of a deceased person according to canons of descent enacted in 1808; and that our statute governing the distribution of personal property, with some legislative changes made from time to time, traces its ancestry directly to the English Statute of Distribution of 1670.

In order to familiarize itself with modern legislative trends, your committee studied carefully the laws of England and some of the states which have revised and brought up to date, in the light of changing social conditions, their laws of intestate succession. We have also profited by our study of the Model Probate Code. We have further had the benefit of the study made by the Commission on the Revision of the Laws of North Carolina Relating to Estates (1934-1939) and one recently made on the subject by Professor Wiggins at Columbia University.

After nearly a year's work your drafting committee presented in September, 1958, a proposed new intestate succession act for North Carolina to the General Statutes Commission for its consideration. The new statute, as drafted by our committee, represented an attempt on our part to revise the present laws of North Carolina in order to modernize them and thus bring them in line with present-day thinking on the subject of intestate succession. Without going into detail at the present time, your committee recommended for your consideration the following propositions:

(1) The abolition of the distinction between real and personal property for devolution purposes and the harmonization into one system of the rules of succession with but one class of distributees entitled to take both kinds of property. This would eliminate the two separate statutes for the descent of real property and the distribution of personal property which we now have.

(2) The abolition of the distinction between ancestral and non-ancestral property and between inheritance rights of relatives of the whole and half-blood.

(3) The abolition of the old marital life estates of dower and curtesy and the substitution in lieu thereof of an outright portion in fee simple of the decedent's estate for the surviving spouse, the size of the share to depend upon the number of surviving children and of those who have died leaving lineal descendants. In some instances, where there are no surviving children of their lineal descendants, the surviving spouse may take the entire estate of the decedent. The surviving spouse is, by the proposed statute, made the legal heir of the decedent spouse. For inheritance purposes husband and wife are placed on an equal basis, and a floor is put under the share that goes to the surviving spouse.

(4) That each spouse be given the right to dissent from the other spouse's will.

(5) That parents be given preference over brothers and sisters in inheritance from the intestate.

(6) That there be no limitation on the right of succession by lineal descendants of an intestate; but that the right of succession by collateral kin not be extended beyond the fifth degree of kinship to an intestate. Under the present North Carolina law the right of representation is unlimited both as to lineals and collaterals.

(7) That, in order to provide for a more equitable distribution of a decedent's estate, there be a modification of the present strict per stirpes concept as to real property and the per capita with representation concept as to personal property. This recommendation necessitated the drafting of a detailed statute providing for the "Distribution Among Classes."

(8) A detailed statute concerning the inheritance rights of illegitimates.

(9) Retention of the substance of the present law concerning adopted children.

(10) A more detailed statute concerning advancements, which goes beyond the present law to include as an advancee any person who would be an heir of the intestate donor upon the latter's death.

(11) A statute permitting renunciation by a person taking either by intestacy or by will.

(12) A rewriting of the present law regarding inheritance by unborn relatives of an intestate. The substance of the present law is retained.

(13) A statute clarifying rights of inheritance by, through, or from an alien.

(14) A new homesite statute to protect a non-consenting spouse against

alienation by the other spouse of the principal place of residence. Such a statute was deemed necessary in view of the proposed abolition of dower and curtesy.

After the proposed New Intestate Succession Act, drafted by your committee, was submitted to the General Statutes Commission, the drafting committee met with the members of the Commission some thirteen times, from September 26, 1958, through December 20, 1958, to explain the proposed changes in the law. At these meetings the Commission carefully analyzed and discussed in detail each section of the statute proposed by the drafting committee. As a result of this work there evolved a clearly-drawn, up-to-date Intestate Succession Act for North Carolina, a statute which would distribute the property of an intestate in approximately the way the average intestate would desire.

Your drafting committee has written explanatory comments on each section of the statute, copies of which are attached hereto.

In closing this report, we wish to commend Mr. Thomas L. Young, Revisor of Statutes, for his able assistance and for the fine cooperation he has given us in completing the task assigned us.

It has been a great privilege for us to be associated with the General Statutes Commission in the completion of this highly necessary and important work for the State of North Carolina. We have enjoyed our association with you and you have our greatest respect for the commendable job you are doing for the State.

Respectfully submitted,

Norman A. Wiggins

Bryan Bolich

Fred B. McCall, Chairman

INTRODUCTION

During its 1959 Session, the General Assembly of North Carolina enacted legislation completely overhauling the laws of this State relating to intestate succession and in so doing abolished unfortunate inequities and antiquities in our intestacy laws dating back to 1808 and 1670. As a result of the enactment of Senate Bill 102, ratified on June 10, 1959, and which will be found at Chapter 879 of the Session Laws of 1959, this State at long last has a clearly-drawn, up-to-date Intestate Succession Act, reflecting what has been termed some of the best and latest thinking in this area of the law in this Country and which is designed to distribute the property of an intestate in approximately the way the average intestate would desire.

This legislation was the principal subject of a Special Report of the General Statutes Commission. In that report were an exhaustive explanation of the details of this new Intestate Succession Act, as it was introduced in the General Assembly, and an explanation of how the drafting and preparation of the Act came about. Suffice it here to say that the Act was drafted for The General Statutes Commission by a committee of experts in this field, composed of Professors of Law Fred. B. McCall, Bryan Bolich and Norman Wiggins, and represents the years of study these drafters have spent in the field, over a year in the actual drafting and literally hundreds of hours of concentrated polishing and redrafting by The General Statutes Commission in order to present a readable, understandable and workable Intestate Succession Act with as few practical, procedural and legal flaws as it is humanly possible to prepare.

The bill to rewrite the Intestate Succession Act was, of course, introduced in both houses of the General Assembly early in the session and was referred to Senate Committee on Judiciary Number 2 and House Committee on Judiciary Number 2. The entire bill was explained in general to joint sessions of these two committees twice in public hearings. Thereafter, subcommittees were appointed from both committees to meet together and study the bill closely and critically. These subcommittees met together almost daily for over six weeks and after hard, close, critical study of the bill which resulted in some amendments to it, the subcommittees reported back to their full committees and recommended the passage of a committee substitute incorporating the changes recommended by the subcommittees.

The committee substitute was reported out of both committees favorably and passed the Senate overwhelmingly and the House by a smaller but still impressive margin, to become effective July 1, 1960.

Thomas L. Young, Revisor of Statutes and Ex Officio Secretary to the General Statutes Commission, prepared an addendum to supplement the Special Report on this legislation and to set out and explain the amendments made in the bill after it was introduced. The Special Report and the Addendum were distributed to the Clerks of Superior Court at the annual meeting of their Association in Asheville, North Carolina, on July 2, 1959. At this meeting, the new Act was discussed by Mr. Young

and by Judge Henry A. McKinnon of the Superior Court of North Carolina. The material was also distributed at the 1959 meeting of the Association of Assistant and Deputy Clerks of Superior Court in Chapel Hill and was again discussed by Mr. Young.

Demand for these two publications quickly exhausted the supply and indicated a need for a reprint. The subject was scheduled for discussion again at the 1960 Conferences of the Association of Clerks of Superior Court, the Association of Assistant and Deputy Clerks of Superior Court, and by smaller groups of attorneys, public officials and others. In recognition of this need, the Institute of Government has published this edition of the Special Report, incorporating the Addendum for more convenient reference, with the consent of the General Statutes Commission. Royal G. Shannonhouse, Assistant Director of the Institute of Government, prepared the consolidated manuscript.

taken into account in the same manner as if it had been made directly to such heir, but the value shall be determined as of the time the original advancee came into possession or enjoyment, or when the heir came into possession or enjoyment, or at the time of the death of the intestate donor, whichever first occurs. If such heir is entitled by inheritance to a lesser share in the estate than the advancee would have been entitled to had he survived the intestate donor, then the heir shall only be charged with the advancement in the proportion his share in the estate bears to the share which the advancee would have taken."

Comment:

This section goes beyond the former law in that it provides that where an advancement has been made and the advancee dies before the intestate donor, leaving an heir who takes by intestate succession from the intestate donor, the advancement shall be taken into account in the same manner as if it had been made directly to such heir.

"§ 29-28. Inventory. - If any person who has, in the lifetime of an intestate donor, received a part of the donor's property, refuses, upon order of the clerk of superior court of the county in which the administrator collector qualifies, to give an inventory on oath, setting forth therein to the best of his knowledge and belief the particulars of the transfer of such property, he shall be considered to have received his full share of the donor's estate, and shall not be entitled to receive any further part or share."

Comment:

This section changes the former G. S. 28-151 in that the advancee under the new law must upon the order of the clerk of superior court give an inventory on oath, setting forth to the best of his knowledge and belief the particulars of the transfer of such property.

"§ 29-29. Release by advancee. - If the advancee acknowledges to the intestate donor by a signed writing that he has been advanced his full share of the intestate donor's estate, both he and those claiming through him shall be excluded from any further participation in the intestate donor's estate."

Comment: The advancee may in a signed writing release any possible future interest which he might otherwise have in the intestate's donor's estate. Such a release is binding on the advancee and those claiming through him.

"Article 8. Election to Take Life Interest in Lieu of Intestate Share.

"§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided. - (a) In lieu of the share provided in G. S. 29-14 or G. S. 29-21, the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take

as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seized and possessed of an estate of inheritance at any time during coverture, except that real estate in which the surviving spouse has waived his or her rights by joining with the other spouse in a conveyance thereof.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

(c) The election provided for in subsection (a) may be made at any time within six months after the death of the deceased spouse by the filing of a notice thereof, in the nature of a petition, with the clerk of superior court of the county in which the administration of the estate is pending or should be commenced. The notice of election shall:

(1) Be directed to the clerk with whom filed;

(2) State that the surviving spouse making the same elects to take under this section rather than under the provisions of G. S. 29-14 or G. S. 29-21, as applicable;

(3) Set forth the names of all heirs, devisees, legatees, personal representatives and all other persons in possession of or claiming an estate or an interest in the property described in subsection (a); and

(4) Request the allotment of the life estate provided for in subsection (a).

The notice of election may be in person, or by attorney authorized in a writing executed and duly acknowledged by the surviving spouse and attested by at least one witness. If the surviving spouse is a minor or an incompetent, the notice of election may be executed and filed by a general guardian or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the notice of election may be executed and filed by a next friend appointed by the clerk. The notice of election, whether in person or by attorney, shall be filed as a record of the court, and a summons together with a copy of the notice shall be served upon each of the interested persons named in the notice of election.

(d) In case of election to take a life estate in lieu of an intestate share, as provided in subsection (a), the clerk of superior court, with whom the notice of election has been filed, shall summon and appoint a jury of three disinterested persons who being first duly sworn shall promptly allot and set apart to the surviving spouse the life estate

provided for in subsection (a) and make a final report of such action to the clerk.

(e) The final report shall be filed by the jury not more than sixty days after the summoning and appointment thereof, shall be signed by all jurors, and shall describe by metes and bounds the real estate in which the surviving spouse shall have been allotted and set aside a life estate. It shall be filed as a record of court and a certified copy thereof shall be filed and recorded in the office of the register of deeds of each county in which any part of the real property of the deceased spouse, affected by the allotment, is located.

(f) In the election and procedure to have the life estate allotted and set apart provided for in this section, the rules of procedure relating to partition proceedings shall apply except insofar as the same would be inconsistent with the provisions of this section.

(g) Life estates taken by election under this section shall not be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by a purchase money mortgage or purchase money deed of trust.

(h) If no election is made in the manner provided for in subsection (c) within six months after the death of the deceased spouse, the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased spouse by virtue of this section shall terminate."

Comment: Without doubt the most substantial amendment to the Intestate Succession Act made by the subcommittees and enacted by the General Assembly was that embodied in § 29-30. It will be recalled that in addition to the basic bill introduced, a companion bill provided for the creation of family homesites and would allow either spouse in effect to be a free trader as to all his or her real property except that constituting all or a part of the family homesite, the place where the family lived, which could only be conveyed with the joinder of the non-owning spouse. Suffice it to say that this bill met so much opposition from various members of the General Assembly who were concerned about the effect it would have on the searching of titles and the practice of land law, that the subcommittees early in their deliberations sought a substitute for the homesite statute. The members felt, as had the drafting committee and The General Statutes Commission, that in view of the abolition of the estate of dower, but in light of the Constitutional requirement that men join in the conveyances of their wives to give them validity, some protection should be afforded the wife equalling or exceeding the partial protection against unilateral conveyance by the husband of his property which had been provided by dower.

After lengthy discussion and study, the subcommittees concluded and recommended that the Act be amended by adding thereto a new Article 8, to provide an election to take a life interest in lieu of an intestate share. Patterned closely after our former dower statutes and conforming in

procedure as closely as possible the partition proceeding, the election permits a surviving spouse to elect within six months after the death of the intestate whether he or she shall take an intestate share in all the intestate's property, both real and personal, or a life estate only in one-third in value of the intestate's realty, which one-third shall include the last home place, regardless of the value thereof or the fact that it might exceed the fractional limitation of one-third. The question of whether to take by intestacy or elect to take the life estate would be one to be decided by the surviving spouse who in most cases would prefer to have the larger intestate share but might prefer to have the home for life than a fractional share only in a small estate. Or, the estate situation might be such that the creditors would strip the estate and the surviving spouse would get nothing if she or he did not elect to take the life estate which is exempt from the claims of creditors. Or, the taker might have substantial estate of his or her own, and prefer to have a life interest in certain income producing property for life rather than the fee in a larger fractional share, thus avoiding certain Federal estate tax impacts. Other reasons why a surviving spouse would prefer to have a life estate under the election than an intestate share will depend on the facts in a any given case, but at any rate, the examples above illustrate instances in which the device will be useful. An additional advantage to the device is that it is felt that it will leave title law in exactly the same position it was, since under the election, very much like dower but extended to protect both spouses, an inchoate right to elect arises, so that like dower, the only effective way to convey property and cut off this inchoate right would be by securing joinder of the non-owning spouse. It is felt that the election device answers every question raised by the title lawyers, avoids every objection to the originally proposed homesite statute, and still adequately protects the spouse and amounts to more than satisfactory substitute for the protection afforded by the inchoate dower estate, now abolished.

Despite its similarity to dower, the section providing the election is carefully worded to spell out with great clarity the incidents of the election, how it can be made, the results of the election, and the result of failure to elect within the time specified. The procedure to be followed by the clerk in situations when election is made is carefully spelled out so that just as little as possible is left to conjecture.

The election to take a life interest device has been used effectively in Illinois for a number of years, and although the section in our Act is not copied from Illinois and is felt to be preferable, it is also felt that it will operate in substantially the same way and if the Court is called on to construe it, precedent will not only be available from our old dower law but also from the case law of Illinois on the matter.

Accordingly, although a radical departure from the Act as drafted, and a completely novel approach to the problem, drafted entirely under the supervision of the subcommittees, the addition of Article 8 to the Act is felt to have been a worthwhile, useful and highly utilitarian improvement of the Act, fully as desirable as the discarded homesite statute, and expected to be a substantial addition to our intestacy laws.

A BILL TO BE ENTITLED AN ACT TO REWRITE THE INTESTATE SUCCESSION LAWS OF NORTH CAROLINA.

The General Assembly of North Carolina do enact:

Section 1. G. S. 28-149, which section is entitled, "Order of Distribution", and Chapter 29 of the General Statutes, which chapter is entitled, "Descents", are hereby repealed, and Chapter 29 of the General Statutes is rewritten to read as follows:

"Chapter 29.

"Intestate Succession.

"Article 1. General Provisions.

"§ 29-1. Short title. - This chapter shall be known and may be cited as the Intestate Succession Act.

"§ 29-2. Definitions. - As used in this chapter, unless the context otherwise requires, the term:

(1) 'Advancement' means an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift; except that no gift to a spouse shall be considered an advancement, unless designated in writing as an advancement. [Amendment underlined.]

Comment: Whereas the definition of "Advancement" provided that no gift to a spouse should be considered an advancement, the subcommittees concluded that if the settlor of the advancement actually wished to advance his or her spouse he or she should be able to do so and accordingly amended the proposed definition of advancement to read as shown.

(2) 'Estate' means all the property of a decedent, including but not limited to:

a. An estate for the life of another; and
b. All future interests in property not terminable by the death of the owner thereof, including all reversions, remainders, executory interests, rights of entry and possibilities of reverter, subject, however, to all limitations and conditions imposed upon such future interests.

(3) 'Net estate' means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate.

(4) 'Heir' means any person entitled to take real or personal property upon intestacy under the provisions of this chapter.

(5) 'Lineal descendants' of a person means all children of such person and successive generations of children of such children."

Comment:

A. Purpose. Herein are found definitions of words or phrases which will be encountered later in the new law. Obviously, they are inserted for the purpose of making clear the meaning of such words or phrases as they are used in the statute, and thus to eliminate, so far as possible, any problems of construction that might arise.

"Estate" of a decedent is defined to include not only the property in which the decedent owns a present, possessory, inheritable interest but also all future, non-possessory interests in property owned by him not terminable by his death. As to future interests, it was felt that the devolution thereof on the death of the owner should thus be made explicit. An estate for the life of another was included in the definition so as to preserve the effect of present G. S. 29-1, Rule 11. For example, if X transfers realty to A for the life of B and A dies intestate before B (who is the measuring life), the estate of A in the property will descend as if it were an inheritable estate to the heirs of A during the rest of B's life.

"Heir." Under the old North Carolina law, by virtue of the separate statutes for the descent of real property (former G. S. 29-1) and for the distribution of personal property (former G. S. 28-149), the land of an intestate technically descended to his heirs and his personal property went to his next of kin or distributees. Since, for devolution purposes, the new statute abolishes the distinction between real and personal property, it became necessary to re-define the word "heir" to mean any person entitled to take real or personal property upon the death intestate of the owner thereof.

"Lineal Descendants." Since the phrase "lineal descendants" occurs frequently in the succeeding sections of this Act, it became necessary to define it. Though the definition of "lineal descendants" is broadly stated, it was not intended that children of living children should share in the estate. This becomes evident from a reading and application of the pertinent sections of the Act. In other words, a living lineal descendant excludes his or her own lineal descendants.

(6) 'Share', when used to describe the share of a net estate or property which any person is entitled to take, includes both the fractional share of the personal property and the undivided fractional interest in the real property, which the person is entitled to take.

Comment: In order to make abundantly clear that both real and personal property shall descend and be distributed to the same persons and that the share which any person is entitled to take includes that person's pro rata share in both the intestate's personalty and realty and that the share in the realty is an undivided interest, an entirely new definition of "Share" was added to § 29-2, as shown.

"§ 29-3. Certain distinctions as to intestate succession abolished. - In the determination of those persons who take upon intestate succession there is no distinction:

(1) Between real and personal property, or
(2) Between ancestral and non-ancestral property, or
(3) Between relations of the whole blood and those of the half-blood."

Comment:

A. Purpose. In the determination of those persons who take upon intestate succession, this section abolishes the distinction between real and personal property and facilitates the harmonization of the rules of succession into one uniform system with but one class of distributees entitled to take both kinds of property; and further eliminates consideration as to whether the decedent's property was ancestral or non-ancestral or those taking it were of the whole or of the half-blood insofar as intestate succession is concerned.

B. Reasons. (1) Separate Statutes re Personalty and Realty: North Carolina was one of three states (Delaware, North Carolina, and Tennessee) which retained separate systems. The distinction is historical in origin; the plan of inheritance of realty came through the feudal law of England and was designed to support and defend the feudal economy; that of the distribution of personalty came from Roman law and was administered by the Ecclesiastical Courts of England. Emphasis of ownership is now shifting from real to personal property. The nature of property owned by a person at his death is a matter of pure accident; it is illogical that the right of inheritance by the spouse, or by the brother or sister, or by the parents of the deceased, no issue surviving, should depend perchance upon the nature of the property left.

A New York Commission in recommending the same change, said: "In the administration of an estate there should be as little difference as possible in the treatment of real and personal property. Whatever reasons may have existed in the past for such distinction, the difference is out of harmony with the trend of modern times." Professor Maitland, the distinguished legal scholar, says: "The day is coming, I hope, when we shall see that two systems of intestate succession are one system too many. One system is what a civilized jurisprudence requires and here as always scientific jurisprudence is on the side of convenience and common sense."

(2) Ancestral Property. North Carolina was one of seven states (North Carolina, Connecticut, Indiana, California, New Jersey, Rhode Island, and Tennessee) which retained rather extensive provisions regarding ancestral property. England, from whence the notion came that descent must be traced from the first purchaser, abolished all distinction between ancestral and non-ancestral property by the English Law of Property Act of 1925. In America at least twenty-three states make no such distinction. The doctrine originated in the common law rule of descent that only those collateral kin who were of the blood of the first purchaser of the land could inherit. The common law of descent inquired into the source of the

intestate's title in order to return the land, in the event of the failure of lineal descendants to the relatives of the person who first brought it into the family. Under the old North Carolina law, former G. S. 29-1(4), on the failure of lineal descendants, where the inheritance was transmitted by descent from the ancestor, or was derived by purchase (i.e., by will, gift, or settlement) from the ancestor by one who in the event of the ancestor's death would have been his heir or one of his heirs, the collateral relatives who inherited the estate had to be of the blood of the first purchaser, through whatever intermediate devolution by descent, gift, or devise it may have passed, and however remote it may have been from the first ancestor. Most of the states which retain the doctrine hold that the ancestor from whom the estate must be traced is the one from whom the property immediately came to the intestate, rather than the first or original purchaser. There were two exceptions to the North Carolina rule: (a) where property was not so transmitted, or if so, the blood of the ancestor was extinct, the collateral kin inherited regardless of the ancestral property doctrine [former G. S. 29-1(5)]; and (b) surviving parents took from the decedent who died without leaving issue or brothers or sisters or their issue, even though the parents were not of the blood of the ancestor from whom the land descended. [former G. S. 29-1(6)]. The new statute eliminates these laws and along with them not only the difficult problem of statutory construction but also that of properly applying the statutes to the numerous factual situations that may arise under them. The effect of the new law is to cause all property to pass according to one common rule whatever its character and from whatever source derived.

(3) Half-bloods. Closely bound up with the ancestral property doctrine in North Carolina was the question of inheritance by collateral kindred of the half-blood, i.e., collateral relatives of the intestate descended from different spouses of a common ancestor. At common law heirs of the whole blood excluded those of the half-blood. As early as 1784 the North Carolina Legislature declared that the half-bloods shall inherit lands of an intestate equally with the whole bloods. This law was found in former G. S. 29-1(6). However, Rule 6 had to be construed with former G. S. 29-1, Rule 4, regarding the inheritance by collaterals of ancestral estates, and, it has been held that collateral relations of the half-blood inherit equally with those of the whole blood only when the former are of the blood of the ancestor from whom the estate was derived. Thus we see that although the distinction between half and whole bloods was abolished by law, the ancestral property doctrine, when applicable, seriously restricted the right of inheritance by the half-bloods. With the latter doctrine abolished then it follows that the half-bloods will inherit freely with the whole bloods.

The operation of the ancestral property doctrine under the old North Carolina law may be illustrated as follows: X owns in fee simple a tract of land located in North Carolina. Upon X's death intestate the property is inherited by Y, X's only son and heir. Y marries M and by her has children, A, B, and C. Y then dies intestate and the land is inherited by his children A, B, and C subject to M's dower right therein. Later M remarries, to H, and by this second husband has two children, D and E. Then B dies intestate and without issue leaving surviving him his mother, M; his full brother and sister, A and C; and his half-sisters,

D and E. Who will inherit the portion of the farm which B took from Y? It will go to A and C, B's brother and sister of the whole blood. His half-sisters, D and E, by his mother's second marriage to H will be cut out because they are not of the blood of Y, or of X, the ancestor who first brought the property into the family. This is the effect of reading former G. S. 29-1, Rule 6, as to rights of half-bloods to inherit, with former G. S. 29-1, Rule 4, which governs the devolution of ancestral property. B's mother M takes nothing because, under the facts stated, she is deferred to B's full brother and sister. Former G. S. 29-1, Rule 6. Under the same Rule, if B had left no one surviving him but his mother, M, M would have taken the land though she was not of the blood of the ancestor X. This was an exception to the ancestral property doctrine. Also, if B had left no one surviving but his half-sisters, D and E, they would have taken the land under former G. S. 29-1, Rule 5, the blood of the ancestor, X, having become extinct. This was another exception to the ancestral property doctrine.

If, in the illustration given, B had purchased for value a part or all of the land from his father, Y, then upon B's death this purchased property would have descended to his full brother and sister and also to his sisters of the half-blood, share and share alike. The descent from X to Y and thence to B would have been "broken" and the ancestral property doctrine would no longer apply.

Such complications and problems of statutory construction are eliminated, and the whole and half-blood relatives of B by the same mother all inherit alike from him, absent his mother, under the new statute.

"§ 29-4. Curtesy and dower abolished. - The estates of curtesy and dower are hereby abolished."

Comment:

A. Purpose. The purposes of this section are to eliminate dower and curtesy for the future by presently abolishing the inchoate or unaccrued estates of dower and curtesy and thereby permit the modernization of marital property rights in this State. This is done by G. S. 29-14 which gives the surviving spouse, whether husband or wife, an equal and substantial outright share of all the assets of the deceased spouse's estate; such share being guaranteed by new G. S. 30-1 through 30-3, which give such survivor who does not receive one-half or more of the property passing upon the death of the testator a right to dissent from his or her will and generally take his or her intestate share as therein provided. And since the abolition of dower and curtesy permits husband and wife to convey their separately owned land without the other's joinder, except as the Constitution Article X, Section 6, prevents a wife from conveying her real property without her husband's assent, it is proposed by the Homesite Statute, G. S. 39-14.1 through 39-14.11, to protect the home of married persons, whether owned by husband or wife, by preventing its conveyance without the other's assent.

B. Reasons. The ancient marital rights of dower and curtesy are products of the English feudal system, which was based upon land-holding in return for personal services, and prior to the Wills Act (1540) did not

legally permit an owner to dispose of his land by will. On his death intestate it went by right of primogeniture to the eldest son to the exclusion of the rest of the immediate family, and neither husband nor wife could ever be heir to the other; nor a parent the heir of his child. Under such a system of law and when there was little of commerce and land was the foundation of society, the life estates of dower and curtesy afforded the surviving spouse, daughters and younger sons of the deceased land owner some measure of assured economic security. But these grandly barbaric rules of inheritance in effect made a will for a man which no sane testator would ever make. In consequence, English law eventually permitted freedom of testation so that a person could by will cut off his or her family completely except for the surviving spouse's right of dower or curtesy which could not be barred by will or by deed without the other's written assent.

Except for North Carolina's abolition of primogeniture in 1784, we adopted almost completely this English common law system. So long as our economy was essentially agrarian, and the family farm constituted the bulk of the average person's estate, dower and curtesy worked pretty well. But with the twentieth-century shift of population from the farm to the city, the property of the average person is no longer concentrated in land, but consists of life insurance, bank deposits, stocks, bonds and business interests. These forms of wealth are classified as <u>personal property</u>, and since dower and curtesy attach only to <u>real property</u>, they have today become largely anachronous because they no longer serve their original purpose of guaranteeing for the surviving spouse a reasonable share of the other's property. Also, dower and curtesy are confined to a <u>life interest</u> and are glaringly unequal because curtesy gives the husband a life estate in <u>all</u> of his wife's land, while her dower is limited to a life estate in only <u>one-third</u> of his land.

The common law life estates of dower and curtesy have been abolished by statute in England and about two-thirds of the United States; in most of which the surviving spouse gets absolute title to a fractional share of the other's estate. In the remaining one-third of the states substantial alterations of dower and curtesy have occurred, a principal tendency being to equalize the rights of husband and wife by limiting his life estate to one-third of her lands. In about twelve of these states dower and curtesy life estates still exist. Thus, the predominant American solution is to abolish the life estates of dower and curtesy, which are confined to real property, and to give the surviving spouse absolute title to a fractional share of both the real and personal property comprising the estate of the deceased, which share is often assured by giving the survivor the right to dissent from the deceased's will.

North Carolina retained both dower and curtesy in essentially their common law forms, except that, as judicially interpreted, Article X, Section 6, of our Constitution makes the husband's curtesy initiate practically a fiction, and permits his wife to deprive him of curtesy consummate by her will. These ancient relics of feudal England were abolished because they unnecessarily hampered freedom of alienation of land and no longer adequately provided for the surviving spouse because limited to a life estate and confined to real property.

C. <u>Source</u>. Model Probate Code, §§ 31, 22(a) and 32.

"§ 29-5. Computation of next of kin. - Degrees of kinship shall be computed as provided by G. S. 104A-1."

Comment: This section embodies the original law, the civil law rule, for the computation of the degrees of kinship to the intestate. (G. S. 104A-1.)

"§ 29-6. Lineal succession unlimited. - There shall be no limitation on the right of succession by lineal descendants of an intestate."

Comment: This section makes no change in the old law. [Former G. S. 29-1(3); G. S. 28-149(1)(3) and (5).]

"§ 29-7. Collateral succession limited. - There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating. [Amendment underlined.]

Comment:

A. Purpose. The purpose of this section is to prevent an intestate's estate from being cut up into infinitesimal parts among his more remote collateral kindred whose consciousness of kinship with the decedent is likely to be correspondingly remote. It departs from the old law which permitted unlimited right of representation by collateral kin of an intestate, and cuts off the right of succession by collateral kin who are more than five degrees of kinship removed from an intestate. Under this section the cut-off point for collateral kin of the decedent who inherit through his brothers or sisters would be with the decedent's great-grand-nieces and nephews; and for his collaterals inheriting through his uncles and aunts, the terminal point would be the decedent's first cousins once-removed, or, as they are sometimes denominated, his second cousins.

A number of states, including New York (1929) and South Carolina (1932), have placed restrictions on the right of representation by the more remote collateral kin.

Comment on Amendment: Because of a feeling on the part of some of the Legislators that "blood is thicker than the State of North Carolina", and that intestate property should never escheat when there is a blood relative of the intestate left alive, regardless of the remoteness of the degree of consanguinity, the provision in the bill limiting collateral succession to five degrees of kinship was amended on the floor of the Senate to provide that the limitation on collateral succession should not apply where there is no collateral relative within five degrees of kinship but there are other collateral kin, so that more remote collaterals may inherit for the purpose only of preventing escheat. Just what effect this particular amendment will have on the scheme of descent and distribution written into the Act is not crystal clear, but it is felt that the principal of fifth degree limitation on collateral succession is so interwoven in the Act that the Court would have little difficulty in following

the statutory scheme, and allow collateral succession by relatives more remote than the fifth degree only to prevent escheat. Lineal succession, of course, remains unlimited.

"§ 29-8. Partial intestacy. - If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will shall descend and be distributed as intestate property."

Comment: This section is self-explanatory.

"§ 29-9. Inheritance by unborn infant. - Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him."

Comment: This section is a re-write of former G. S. 29-1, Rule 7, with no change in the law.

"§ 29-10. Renunciation. - (a) An heir may by a signed and acknowledged writing delivered to the Clerk of Superior Court of the county in which the administrator or collector qualifies, renounce, in whole or in part, the succession to any property of an intestate, and such renunciation shall be retroactive to the date of the death of the intestate.

(b) Such renunciation must occur within one year after the death of the intestate, and if it affects the title to real estate, shall after probate be recorded in the office of the register of deeds of each county in which any part of the land affected by the renunciation lies. [Amendment underlined.]

Comment:

A. Purpose. The purpose of this section is to rewrite former G. S. 28-149(13), which allowed renunciation by the distributee of intestate personalty. The new law sets forth a clear and simple procedure to govern the renunciation of intestate property with the result that the property is considered never to have belonged to the distributee.

The subcommittees, in considering the proposed sections on renunciation concluded that the paper writing by which an heir may renounce should be acknowledged and in addition, as an assistant to title lawyers, if it affected title to real property should be recorded in the office of the register of deeds of each county in which any part of the land affected by the renunciation lay. This latter amendment should prove a valuable assist to those searching titles in the limited number of cases in which a renunciation is made by having on record a copy of the writing so that the chain of title around the one renouncing is clear and can be easily traced.

B. Reasons. At common law a devisee or legatee may renounce benefits bestowed upon him by the will of the deceased but an heir may not so renounce. The new law is predicated upon the theory that a beneficiary of an intestate estate should be as free to renounce his intestate share as is the legatee or devisee to renounce property given to him by the will of

the deceased. Several other significant features of the new law should be mentioned. First, the renunciation principle is extended to include both real and personal property. Second, when a proper renunciation has been made, the renunciation relates back and becomes operative as of the time of the decedent's death. The property is deemed to have vested in beneficiaries, other than the renouncing beneficiary, on the date of the decedent's death. Thus, the exercise of the renunciation power renders the vesting of the intestate property void ab initio leaving the beneficiary with no interest in such property. Renunciation allows the renouncing beneficiary to renounce his intestate property without such act being deemed a conveyance of property.

C. Source. In general, Model Probate Code, Sec. 58.

"§ 29-11. Aliens. - It shall be no bar to intestate succession by any person, that he, or any person through whom he traces his inheritance, is or has been an alien."

Comment: This section rewrites, clarifies, and places in its proper setting that part of G. S. 64-1 which deals with the rights of inheritance by aliens.

"§ 29-12. Escheats. - If there is no person entitled to take under G. S. 29-14 or G. S. 29-15, or if in case of an illegitimate intestate, there is no one entitled to take under G. S. 29-20 or G. S. 29-21, the net estate shall escheat as provided in G. S. 116-21."

Comment:

A. Purpose. The purpose of this section is to make explicit the situations in which an escheat occurs by reason of a failure of heirs as specified in the stated sections of the Intestate Succession Act.

B. Reasons. While the law of escheat (G. S. 116-20 through G. S. 116-26) is not confined to cases resulting from intestacy, it seemed desirable to include the topic of escheat in the Intestate Succession Act because of the importance of its occurrence in the disposal of intestate property. G. S. 29-7 of the Act limits collateral intestate succession to the fifth degree, while G. S. 29-6 provides that succession by lineal descendants of the intestate shall be unlimited. Thus, the law of escheat is governed in part by this Act because these sections define when a person dies without heirs.

C. Source. See Model Probate Code §§ 22(b)(6) and 192(a).

"Article 2. Shares of Persons Who Take Upon Intestacy.

"§ 29-13. Descent and distribution upon intestacy. - All the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of state inheritance taxes, as provided in this chapter."

Comment:

A. Purpose. The purpose of this article is to supplant former G. S. 28-149 and G. S. 29-1, and to present one uniform plan for determining the order of distribution of the intestate's property, both real and personal.

B. Reasons. Today, there are substantially different tables or chapters for determining the order of distribution of the intestate's property only in Delaware, Tennessee and the District of Columbia. England, the birthplace of the Canons of Descent and the Statute of Distribution, in the Administration of Estates Act of 1925 abolished any distinction between the rules governing the devolution of real and personal property.

"§ 29-14. Share of surviving spouse. - The share of the surviving spouse shall be as follows:

(1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one-half of the net estate, including one-half of the personal property and a one-half undivided interest in the real property; or

(2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one-third of the net estate, including one-third of the personal property and a one-third undivided interest in the real property; or

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars ($10,000.00) in value plus one-half of the remainder of the personal property; or

(4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate. [Amendments underlined; one paragraph deleted by amendment. See "Comment on Amendments," below.]

Comment:

A. Purpose. The purpose of this section is to provide fair treatment for a surviving husband or surviving wife and to give each a fractional outright share in the assets of the deceased spouse's estate without any distinction as to whether the property is real or personal.

B. Reasons. Status of share of surviving spouse when issue survive - in North Carolina. Formerly in North Carolina a surviving wife, when the husband died leaving issue surviving, received a child's share of personalty and a dower interest in the realty. Similarly, a surviving husband, when the wife died intestate leaving issue surviving, received a child's share of personalty and a curtesy interest in the realty. The husband

and wife could never inherit real property directly from each other except in those relatively rare cases where there were no other heirs to make a claim.

Status of share of surviving spouse when issue survive - in other states. It is interesting to note how the surviving spouse is treated in other states when the intestate dies leaving issue surviving. Today, in thirty-one states the surviving spouse, when issue survive, is guaranteed an outright distributive share of the intestate's estate in both real and personal property. Approximately a third of these states give the surviving spouse a one-half share if the intestate is survived by one child, but such share is limited to one-third if the intestate is survived by two or more children. Approximately one-quarter of these thirty-one states give the surviving spouse either a one-third or one-half share of the total assets without reference to the number of children who survive the intestate. There are three states in which the distributive share of the surviving spouse is either a child's share or a one-fourth share of the intestate's estate. In the remaining sixteen states the surviving spouse's share of the intestate's estate, when issue survive, is a fractional share of personalty and a marital estate in the realty which is, or is similar to, dower and curtesy. In England today the surviving spouse, when issue survive, is given the personal chattels, plus the first five thousand pounds of the estate (approximately $12,000) free of death duties and costs. Of the remainder, the surviving spouse receives in trust one-half of such assets.

Status of share of surviving spouse when no issue survive - in North Carolina. Formerly in North Carolina a surviving wife, when the husband died leaving no issue surviving, received ten thousand dollars ($10,000) and one-half of the remainder of the deceased husband's personal estate. Only if there was "no child nor legal representative of a deceased child nor any of the next of kin of the intestate" [former G. S. 28-149(7)], did the widow become entitled to the whole of the husband's personal estate. The wife also received a dower interest in only one-third of her deceased husband's realty. On the other hand, the surviving husband, when the wife died leaving no issue surviving, inherited all of his wife's personalty. If issue of the marriage had been born alive, the husband also received a curtesy interest in all his wife's realty.

Status of share of surviving spouse when no issue survive - in other states. While there is no unanimity of opinion among the several states, in all states when the nearest relatives that survive the intestate are his parents, brothers or sisters, the surviving spouse is favored to either a minimum dollar amount of the estate or a fractional portion of personalty or realty or both. In fifteen states this share varies in amount from $3,000 to $50,000. In eleven states the surviving spouse, when the intestate dies leaving no issue, receives all of the estate. There are nine states which provide that the surviving spouse will receive a one-half share of the intestate personalty. In all but one of these nine states the surviving spouse also receives a one-half share of realty. There are nine other states which provide that the surviving spouse, when no issue survive the intestate, will receive all of the

intestate's personalty, and either a one-half share of realty or dower or curtesy. In England it is provided that the surviving spouse, when no issue survive the intestate, will receive outright a sum of twenty-thousand pounds (approximately $50,000) free of death duties and costs, plus one-half of the remainder of the estate in trust.

Status of share of surviving spouse - under new law. The new law is in keeping with the now almost universally accepted principle that the surviving spouse has a greater claim on the estate which he or she has helped to create than do lineal or collateral kin. Notwithstanding a strong desire to protect minor children, it is a disservice to the spouse, the family, and society when the assets of intestate's estate are divided as they were under the former law of North Carolina. If the surviving spouse is young and has the duty of support and maintenance of minor children, the former law jeopardized such spouse's possibilities of performing that duty. For example, the average intestate estate in the United States contains assets well below $10,000. Under the former law a spouse could inherit a one-tenth share of the deceased spouse's personalty, if nine children survived the intestate. Such spouse would also have received a life estate in one-third or all of the real property, depending upon whether it was the husband or wife who survived. It hardly seems reasonable to cut down the means of adequately discharging the duty to support in proportion to the increase in the duty, but that is what the old North Carolina law provided.

The inadequacy of the old law was amplified in the case of the surviving spouse of advanced years who was faced not with support of minor children, but with the high cost of living and the possibility of future medical and hospital care.

Superimposed upon the inadequacies and inequities of the old North Carolina law was the less disturbing, but nevertheless serious fact, that the minute division of intestate estates brought about under that law forced the clerk of court to audit and record guardianship accounts which actually cost the taxpayer money while rendering little, if any, service to the ward. For example, it is not uncommon where the guardianship account is in the neighborhood of $1,000.00 (the majority of such accounts are below this figure) for the clerk of court to receive a fee ranging from $1.00 to $1.50 for auditing and recording the account. The family, the ward, and the public would be better served by having these small funds paid to the surviving spouse to enable her to carry out her duty of support to the children, or to provide such spouse with the means of her support if she is of an advanced age.

Under the new law, in the absence of descendants or issue, the surviving spouse takes an increased share of the intestate spouse's estate.

Comment on Amendments: As originally written and introduced, the section on the share of the surviving spouse in an intestate estate included provision for certain alternative minimal monetary shares to go to the surviving spouse, depending in size on the family structure. These minimal monetary shares for the surviving spouse were felt to be justi-

fied, worthwhile and desirable by the drafting committee, The General Statutes Commission and the members of the subcommittees considering the bill since they tended to bestow on the surviving spouse most or all of the assets constituting the very small estates and prevented the unfortunate splitting up of these small estates with the necessary, consequent tiny guardianships for minor children. However desirable these minimal shares may have been, it became quickly apparent to the subcommittees that the procedural machinery which our General Statutes contain for the administration of estates simply would not sustain the theory. For instance, how would the estate be evaluated to see whether the surviving spouse would take the minimal monetary share or the alternative fractional share? How was the monetary share paid out, in personalty or realty or both and in what proportions? Did the administrator take control of the realty during the settlement of the estate and while considering what part the spouse should take? Where was there sufficient statutory machinery for evaluating property? These and many other similar perplexing administrative questions plagued the subcommittees in their deliberation. Earnest attempts, consuming weeks of work, were made to draft sufficient stop-gap procedural statutes to handle the problems raised by this minimal monetary share proposition with the expectation that if the Act passed the make-shift procedural statutes going along with it could be rehashed by the General Statutes Commission and amended by the next General Assembly to bring administration of estates machinery into line with the new Act. Despite these efforts, every attempt to draft stop-gap legislation in the area revealed other difficulties. Some feeling was expressed that judicial settlement of estates might be the answer, but is so novel a concept in this State and would be such a large project that it should not be attempted without careful long-term study. Accordingly, with great hesitancy, § 29-14 was substantially rewritten to take out the alternative minimal monetary share features, leaving the surviving spouse to take a simple fractional share of the intestate estate, regardless of the size of the estate. The exception to this was the retention of something quite similar to our former law to give the surviving spouse the first $10,000.00 in personalty and one-half of the rest, plus one-half the realty where there are no children surviving but there are one or more parents surviving the intestate. It was found that our present procedural, administration statutes could easily sustain that. In deleting the provisions as to the minimal monetary share, the subcommittees did so with the understanding that if the minimums are worthwhile, and it was thought that they are, then The General Statutes Commission should undertake the drafting of the necessary administrative statutes to sustain the principal and thereafter recommend amendments to the Act to put the minimums back in.

C. Source. In general, Model Probate Code, Sec. 22.

"§ 29-15. Shares of others than surviving spouse. - Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

(1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two

deceased to his brothers and sisters, who under the former North Carolina law, took realty ahead of parents.

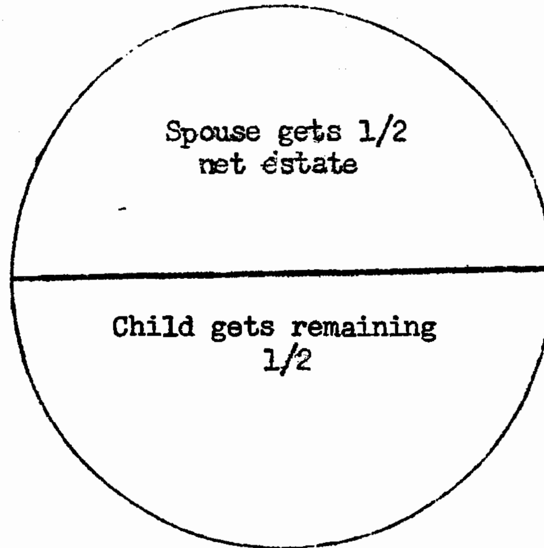
B. Reasons. Today, only in Tennessee and West Virginia do brothers and sisters inherit an intestate's realty to the complete exclusion of the parents. England, from whom the present limitation on parental inheritance was adopted, allowed inheritance by the parent from the intestate as early as 1925.

All the factors favor the taking of the estate by the parents. The relationship between the parent and child is closer than that between brothers and sisters, and hence we can generally assume that the intestate's affection for the parent is superior to that for the brother or sister. Furthermore, equity demands that the aging parent, in return for the support and maintenance he has given such deceased child, be preferred in the distribution of a child's intestate property.

C. Source. Model Probate Code, Sec. 22.

D. Operation. The operation of new Sections 14 and 15 is illustrated by the pie charts which follow and which should be examined for a complete understanding of how Sections 14 and 15 tie together.

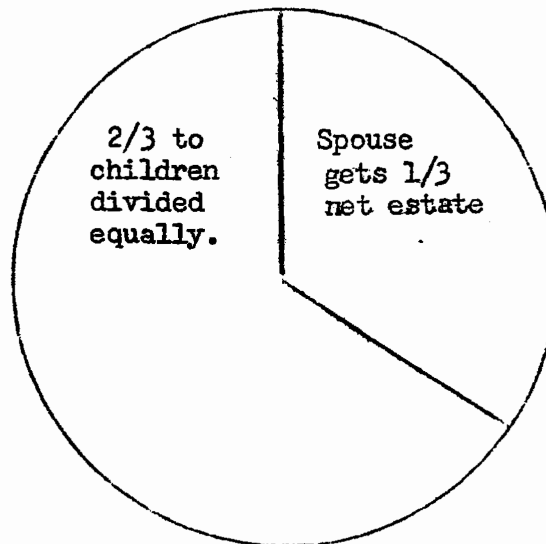
I. Married person survived by spouse and one child or descendant of one child.



§ 29-14(1)

§ 29-15

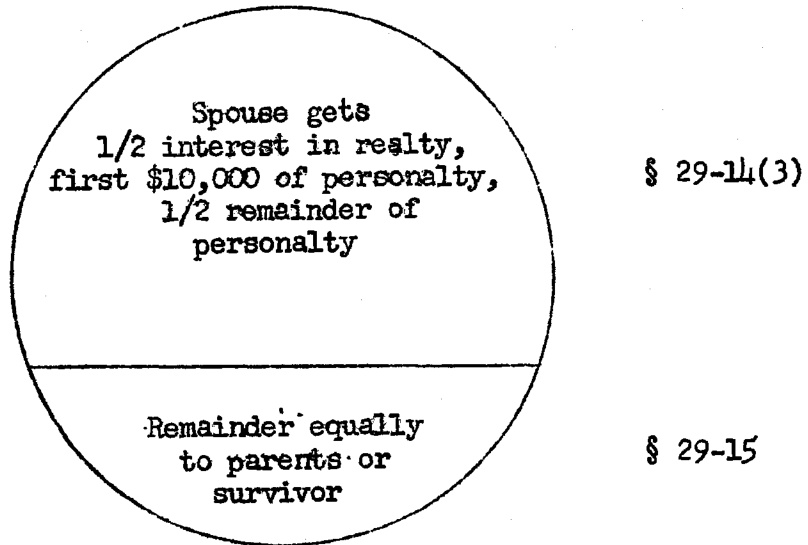
II. Married person survived by spouse and two or more children or their descendants.



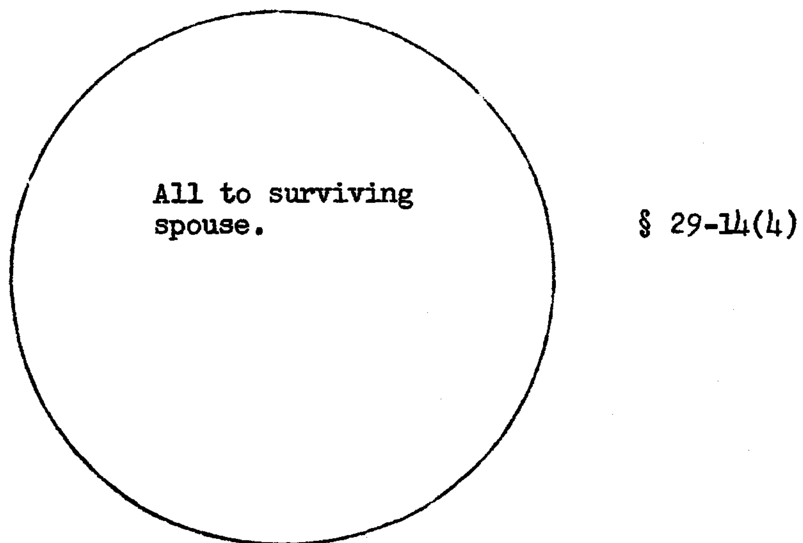
§ 29-14(2)

§ 29-15

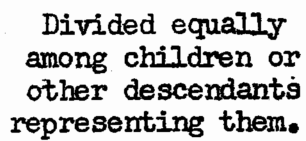
III. Married person survived by spouse and parents but no children or descendants.



IV. Married person survived by spouse but no children, descendants or parents.

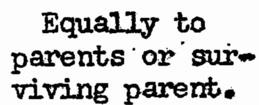


V. Unmarried person or widow or widower survived by a child or children or other descendants.



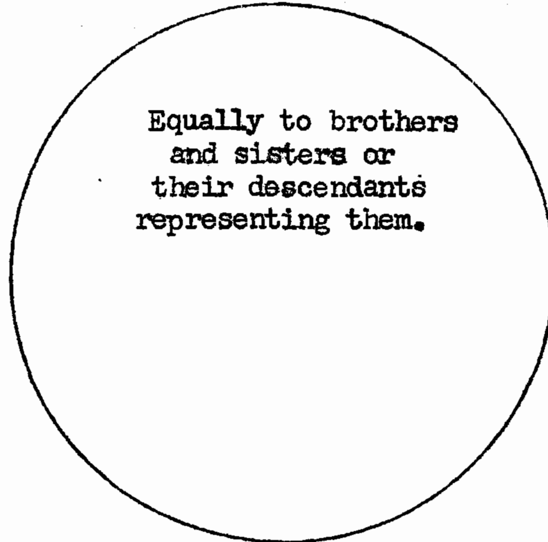
§ 29-15(1), (2)

VI. Unmarried person or widow or widower not survived by children or other descendants.



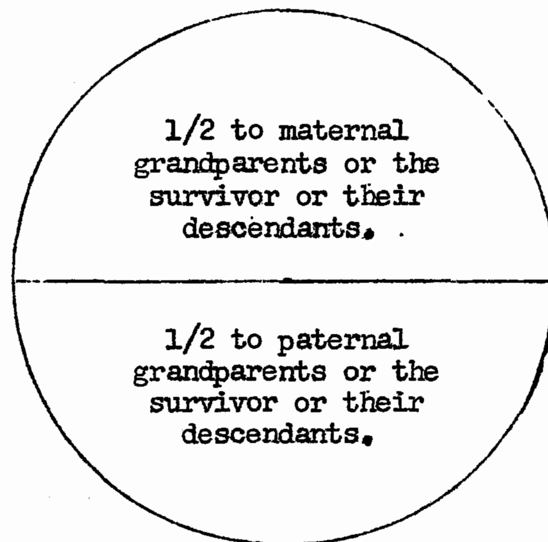
§ 29-15(3)

VII. Unmarried person or widow or widower not survived by children or other descendants nor by a parent but survived by brothers or sisters or their descendants.



§ 29-15(4)

VIII. Unmarried person or widow or widower not survived by children or other lineal descendants, parents, brothers or sisters or their descendants.



§ 29-15(5)

§ 29-15(5)

"Article 3. Distribution Among Classes.

"§ 29-16. Distribution among classes. - (a) Children and their lineal descendants. If the intestate is survived by lineal descendants, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

(1) Children. To determine the share of each surviving child, divide the property by the number of surviving children plus the number of deceased children who have left lineal descendants surviving the intestate.

(2) Grandchildren. To determine the share of each surviving grandchild by a deceased child of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving grandchildren plus the number of deceased grandchildren who have left lineal descendants surviving the intestate.

(3) Great-grandchildren. To determine the share of each surviving great-grandchild by a deceased grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-grandchildren plus the number of deceased great-grandchildren who have left lineal descendants surviving the intestate.

(4) Great-great-grandchildren. To determine the share of each surviving great-great-grandchild by a deceased great-grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-great-grandchildren plus the number of deceased great-great-grandchildren who have left lineal descendants surviving the intestate.

(5) Other lineal descendants of children. Divide, according to the formula established in the preceding subdivisions of this subsection, any property not taken under such preceding subdivisions, among the lineal descendants of the children of the intestate not already participating.

"(b) Brothers and sisters and their lineal descendants. If the intestate is survived by brothers and sisters or the lineal descendants of deceased brothers and sisters, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

(1) Brothers and sisters. To determine the share of each surviving brother and sister, divide the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.

(2) Nephews and nieces. To determine the share of each surviving nephew or niece by a deceased brother or sister of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal

descendants surviving the intestate within the fifth degree of kinship to the intestate.

(3) Grandnephews and grandnieces. To determine the share of each surviving grandnephew or grandniece by a deceased nephew or niece of the intestate in the property not taken under the preceding subdivions of this subsection, divide that property by the number of such surviving grandnephews and grandnieces plus the number of deceased grandnephews and grandnieces who have left children surviving the intestate.

(4) Great-grandnephews and great-grandnieces. Divide equally among the great-grandnephews and great-grandnieces of the intestate any property not taken under the preceding subdivisions of this subsection.

(5) Grandparents and others. If there is no one within the fifth degree of kinship to the intestate entitled to take the property under the preceding subdivisions of this subsection, then the intestate's property shall go to those entitled to take under G. S. 29-15(5).

"(c) Uncles and aunts and their lineal descendants. If the intestate is survived by uncles and aunts or the lineal descendants of deceased uncles and aunts, their respective shares in the property which they are entitled to take under G. S. 29-15 shall be determined in the following manner:

(1) Uncles and aunts. To determine the share of each surviving uncle and aunt, divide the property by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate.

(2) Children of uncles and aunts. To determine the share of each surviving child of a deceased uncle or aunt of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of surviving children of deceased uncles and aunts plus the number of deceased children of deceased uncles and aunts who have left children surviving the intestate.

(3) Grandchildren of uncles and aunts. Divide equally among the grandchildren of uncles and aunts of the intestate any property not taken under the preceding subdivisions of this subsection.

Comment: This section represents some departure from the former law. Its purpose is to provide for a more equitable distribution of a decedent's estate, than was afforded, among classes of his relatives, lineal or collateral, and the lineal descendants of deceased members of such classes. Its operation calls for somewhat extended explanation, illustration and comment.

North Carolina law formerly provided for the descent of realty on a strict per stirpes basis both to lineal descendants and collateral kindred. Personalty on the other hand was distributed per capita with representation. No restriction whatsoever was placed on representation.

The modern tendency is to provide for per stirpes distribution or per capita distribution with unrestricted representation among lineal descendants, per capita distribution with representation restricted to the third or fourth degree among collaterals, and per capita distribution without representation among more remote collaterals. Where per capita distribution with representation is provided, then, when all those entitled to take are of equal degree of consanguinity, their shares are equal. But if there survive one person in a degree nearer to the intestate than the others, the latter take the shares of the deceased persons in the former's degree whom they represent. Thus, if P, the intestate, is survived by nephews A and B, children of a deceased brother X; nephews C, D, and E, children of a deceased brother Y; and nephew F, child of a deceased brother Z, the six surviving nephews share equally, taking one-sixth share each. If, however, brother X had survived P, then he would receive a one-third share, nephews C, D, and E would take the share of their deceased parent, Y, and thus receive a one-ninth apiece, while nephew F would take the one-third share of his deceased parent Z. See Chart A.

To translate the operation of this rule into more concrete terms, assume that P's estate was $90,000. If all P's brothers had predeceased him, each nephew would receive $15,000 under the old law. The circumstance that one of P's brothers survived him altered this distribution radically, so that after the surviving brother X received his $30,000 share, nephews C, D, and E received only $10,000 each, while nephew F received $30,000, or twice what he would have received if all P's brothers had predeceased P.

That survival by a member of a closer degree should have such a sweeping effect upon the shares of descendants or collaterals one degree further removed seemed indefensible for the following reasons:

(1) From the standpoint of P there is no reason to suppose that he would make any difference whatsoever in the treatment of his nephews because of the survival or non-survival of his brother. Nor is it likely that he would discriminate among his nephews to give the only child of a deceased brother three times what he would give each of the three children of another deceased brother. The presumption is instead that he would treat them equally. If one of the primary purposes of a statute of intestate succession is to embody the probable desires of the average decedent, then certainly a rule so likely to contravene them should be altered.

(2) From the standpoint of the needs and deserts of the nephews, it is obvious that these are the same whether their uncle survives the intestate or not. And is nephew F any more deserving because he is an only child? Presumably nephews C, D, and E are in greater need of assistance, since they must share in the estate of their deceased parents whereas nephew F is likely to receive all of his parents' estate. Moreover, the rule which effects this inequality of treatment is anti-social in that it puts a premium on the small family.

The Committee and Commission were moved by the foregoing considerations to propose that modification of the usual rule of per capita distribution with representation which is embodied in Section 16 above. Briefly stated, our purpose was to provide that the surviving persons in the degree

nearest the intestate take the same shares which they would receive under the usual rule but to provide that all the property which would have gone to the deceased members in that degree should go as a unit to all the persons surviving them in the next degree and be divided <u>per capita</u> among such persons. Applying the new law to the hypothetical case already discussed, the surviving brother X would receive $30,000 and the remaining $60,000 would be distributed in equal shares of $15,000 each to nephews C, D, E, and F.

The Commission also believes that some restriction should be placed on the right of persons in the more remote degrees to take when there are persons in nearer degree surviving the intestate, a restriction which operates to prevent the splitting of estates into many minute fractions and which is now very widely adopted in one form or another. The line is perhaps most frequently drawn at the third degree as to collaterals, but this has seemed unduly stringent, especially in view of the fact that no restriction whatsoever existed in this State. A restriction in the fifth degree has therefore been adopted.

To embody these two proposals in a single provision presented a drafting problem of great difficulty, especially since the variation which the former compelled in the familiar rules relating to <u>per capita</u> distribution with representation rendered it highly dangerous to use the customary terminology of "<u>per stirpes</u>," "<u>per capita</u>" and "representation." In drafting Section 16, it was found desirable, therefore, to depart from the more usual statutory form and to present the rules in the form of directions to those calculating the distribution of estates among lineal descendants of the classes entitled by the preceding Section 15 to take. [These classes are to be found in paragraphs (1), (2), (4), and (5).]

The operation of G. S. 29-16 will be illustrated by a series of hypothetical estates. (P in all cases represents the intestate.)

(1) P's estate is $90,000. His spouse is dead. His survivors are three living children, A, B, and C. No child has predeceased him leaving lineal descendants. This being so, under G. S. 29-16(1) the estate will be equally divided among the <u>surviving</u> children, A, B, and C, each child taking $30,000. See Chart 1.

(2) P's estate is $90,000. His spouse is dead. His survivors are one child A and the lineal descendants of deceased children B and C. They are entitled to take under G. S. 29-15(2).

Apply paragraph (1) of G. S. 29-16 to determine the share of the surviving members of the class entitled to take, i.e., P's children. There is only one such surviving member, A. There are only two deceased members of this class who leave lineal descendants, namely, B and C. Add one to two, and divide the estate, $90,000, by their sum, obtaining $30,000, the share of A, the surviving child.

There remains $60,000 to be distributed. Apply paragraph (2) of G. S. 29-16 to determine the share of the surviving children of deceased

members of the class, namely, E and F, children of B; and G and H, children of C. The surviving children number four. One child of C, namely, J, is deceased leaving lineal descendants, J and K, surviving P the intestate. Add four to one, and divide the remaining property to be distributed, $60,000, by their sum, obtaining $12,000, the share of E, F, G, and H, each.

There remains $12,000 to be distributed to the surviving lineal descendants of the deceased child of a member of the class, namely J and K, children of I, child of C. Apply paragraph (3) of G. S. 29-16. This, in effect, directs the application of the rule of paragraph (1) treating J and K as though they were the surviving members of the class referred to therein. Since there are no persons in the same degree as J and K who have predeceased P, leaving lineal descendants, nothing is added to the number of the survivors. Therefore, divide $12,000 by two, obtaining $6,000, the share each of J and K. If J, P's great-grandchild, had also predeceased P leaving children, we would move to paragraph 4 of G. S. 29-16, and, using the same formula, ascertain the share of K to be $6,000 and J's children, P's great-great-grandchildren would share equally the $6,000 which J would have taken had he survived P.

Since the statute places no limitation on the right of succession by lineal descendants of an intestate, it is conceivable that P might die leaving surviving him even more remote lineals than shown in the case given. To avoid endless repetition, paragraph (5) of G. S. 29-16 provides for the use of the same formula in ascertaining the shares of such persons in the remaining property as was used in the preceding spelled-out paragraphs.

By way of comparison - under the former North Carolina law which in the example given, would distribute P's estate <u>per capita</u> with representation, A would get $30,000; E and F, $15,000 each - representing the $30,000 B would have taken; G and H, $10,000, each and J and K, $5,000 each -- representing the $30,000 C would have taken.

Comparatively then, the results of distributing P's estate under the new statute, Section 29-16, and under the former North Carolina law would be as follows:

	New G. S. 29-16	Old N. C. law
A	$30,000	$30,000
E	12,000	15,000
F	12,000	15,000
G	12,000	10,000
H	12,000	10,000
J	6,000	5,000
K	6,000	5,000

The foregoing illustrations are applicable to both real and personal property since the cases assumed <u>inequality</u> in the degree of kinship

to the intestate by his lineal descendants. See Chart 2.

(3) P owns realty worth $90,000. His spouse is dead. His three children A, B, and C have predeceased P. A left one child, E; B, four children: F, G, H, and I; and C, two children: J and K.

Under the former strict North Carolina per stirpes rule as to realty (former G. S. 29-1, Rule 3), E would represent his dead father, A, and would take one-third of P's realty or $30,000 worth; F, G, H, and I would represent their dead parent, B, and share his one-third $30,000, each taking $7,500 worth of P's realty; J and K would represent their dead parent, C, and would share his one-third $30,000, each taking $15,000 worth of P's realty. This was true although these grandchildren of P are all related in the same degree of kinship to him.

To eliminate this obvious inequity in the descent of P's realty, new G. S. 29-16 distributes the property of P equally, per capita, among his surviving grandchildren and each would take one-seventh therein or $12,857.14 worth, as was true as to the distribution of personal property under the old law of North Carolina. See Chart 3.

(4) P's estate is $90,000. His spouse predeceased him. He is survived by one uncle, A; two first cousins, D and E, children of deceased uncle, B; and, three first cousins once removed, J, K, and L, children of deceased first cousin F, who are grandchildren of uncle B; one first cousin, G, child of deceased uncle, C; and two first cousins once removed, M and N, children of deceased first cousin, H, who are grandchildren of deceased uncle, C. All the foregoing are on P's maternal side.

P having no surviving spouse, lineal descendants, parents, brothers or sisters or their lineal descendants, his estate would be divided in equal shares between his paternal and maternal grandparents, if they had survived him [G. S. 29-15 (5) a]. There being no paternal grandparents and no uncles or aunts or their lineal descendants on the paternal side, the half-share to which that side is entitled passes to the maternal side [G. S. 29-15 (5) c]. There being no maternal grandparents, the class next entitled to take are the maternal uncles and aunts of whom A is the only survivor [G. S. 29-15 (5) c]. To determine A's share as the only surviving member of the class entitled to take, apply paragraph (1) of G. S. 29-16 (c).

There being two deceased uncles, B and C, leaving lineal descendants within the fifth degree from P, add one to two and divide the estate, $90,000 by three, obtaining $30,000 - A's share. $60,000 remains to be distributed. Apply paragraph (2) of G.S. 29-16(c) to determine the share of the surviving children of the deceased uncles, B and C. There are three such children, D, E, and G. Two deceased children, F and H, leave lineal descendants surviving P; these lineal descendants are in the fifth degree of consanguinity from P. Hence, their parents, the

deceased first cousins F and H, are counted in computing the shares of D, E, and G. The remaining estate, $60,000, is therefore divided into five shares of $12,000 each, three going to D, E, and G, respectively; leaving $24,000 to be distributed equally between J, K, L, M and N, each taking $4,800 [G.S. 29-16 (c) (3)]. Under the former North Carolina law the distribution of P's $90,000 estate, whether realty or personalty, would be per stirpes, i.e., per capita with representation. Uncle A would get $30,000. The children of uncle B, namely, D, E, and F, would represent their father and take his $30,000, but since F is also dead his children, J, K, and L would take F's share of the $30,000. Hence, D and E would get $10,000 each, and J, K, and L would each get one-third of $10,000 or $3,333.33 apiece. Deceased uncle C's $30,000 share would be divided among his representatives, $15,000 to his son G and $7,500 to each of his grandsons M and N, children of C's decease child H. See Chart 4.

(5) Assume an estate and situation as to relationship identical to that in the foregoing hypothetical estate except that all of P's uncles and first cousins are dead, leaving surviving him his five first cousins, once removed, J, K, L, M, and N. Since there are no surviving members of the class entitled to take, i.e., uncles and aunts, there is no occasion to apply paragraph (c) (1) of G.S. 29-16 to determine their shares. Since P is survived by no children of deceased members of that class there is no occasion to apply paragraph (c) (2) of G. S. 29-16 to determine their shares. There remain, however, lineal descendants of children of deceased members of the class, and paragraph (c) (3) of G. S. 29-16 must be applied to determine their shares. Since no property has been distributed under paragraphs (c) (1) and (c) (2) the entire estate is to be distributed according to paragraph (c) (3), i.e., equally among the five grandchildren of the deceased uncles and aunts of the intestate, namely, J, K, L, M, and N, $18,000 apiece.

These grandchildren of P's deceased uncles are in the degree of consanguinity nearest to him. They are related to P in the fifth degree. If, however, N had died leving a child, O, surviving P, N would not be counted in determining the shares of J, K, L, and M, since O would not be within the fifth degree of consanguinity to P, the cut-off point in representation will have been reached. Hence O, as representing N will take nothing and P's estate will be divided four ways among his survivors, J, K, L, and M, and each would receive $22,500.

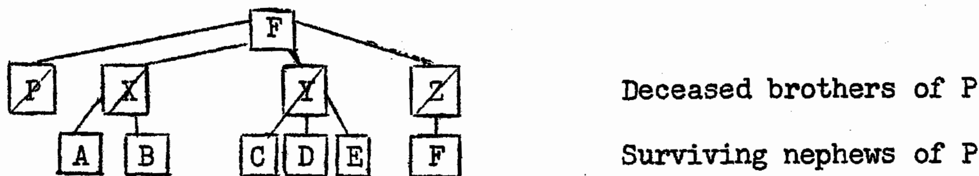
Under the former North Carolina law as to personalty, per capita distribution with unrestricted representation, O would step up and take N's share, namely, $18,000. See Chart 5.

In the interest of time and space, no illustrations are herein included to show how the shares of the intestate's nearer collaterals - his brothers and sisters and their lineal descendants entitled to take under G. S. 29-15 - are determined. G. S. 29-16(b) and its subsections provide for such determination, using the same formula as was employed above in the cases of other class distributions. It will be noticed, however, that the distribution ceases with collaterals of the fifth

degree of kinship to the intestate, his great-grandnephews and great-grandnieces. This, again, is the cut-off point, under the statute, beyond which there can be no taking or representation by collaterals.

In order to make even clearer the operation of the new statute, charts are herewith appended. Each is geared to one of the hypothetical cases posed in the foregoing discussion and is numbered correspondingly, with one exception, Chart A. Chart A illustrates the case discussed in the preliminary comments on proposed G. S. 29-16.

Chart A:
P's estate - $90,000. (Spouse dead; also lineals).
(A) Distribution under former N. C. Law (per capita with representation):

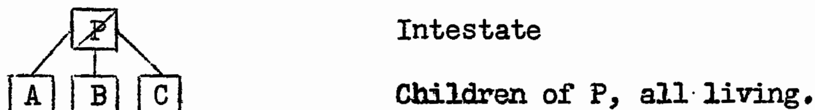


Each surviving nephew takes 1/6 of $90,000, or $15,000.

(B) Suppose brother X survives P:
X takes $30,000.
C, D, and E share $30,000 or $10,000 each.
F takes $30,000 - twice what he would have taken if all of P's brothers had predeceased him; three times what each C, D, and E take.

(C) Under the new law, when the facts are as in (A) above, the same result would occur, but under (B) above:
X takes $30,000.
C, D, E and F would take the remaining $60,000, as a unit, each taking $15,000, or 1/6 or 1/4 of 2/3 of $90,000.

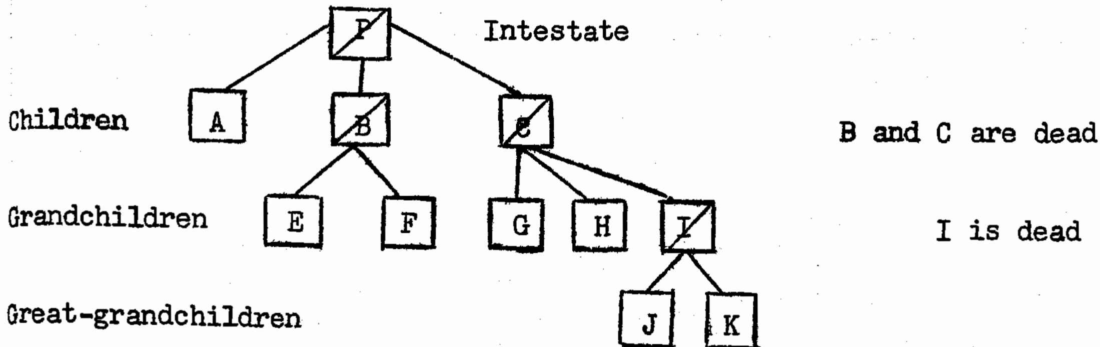
Chart 1:
Facts: P's estate, $90,000; no surviving spouse.
(a) Distribution under new law:



A, B and C each take $30,000.

(b) Distribution under old law:
Same as in (a) above.

Chart 2:
Facts: P's estate, $90,000; no surviving spouse.
(a) Distribution under new law:

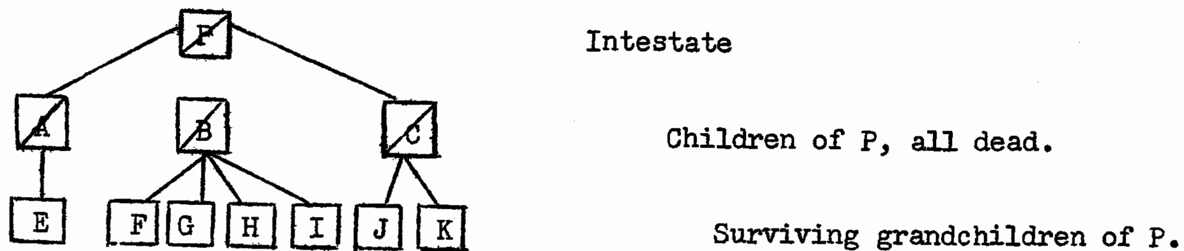


A, surviving child of P, takes $30,000.
E, F, G and H each get 1/5 of remaining $60,000, or $12,000 each.

J and K, children of I, take the remaining $12,000, or $6,000 each.

(b) Distribution under old law:
A gets $30,000.
E and F share $30,000 or $15,000 each.
G and H share 2/3 of $30,000 or $10,000 each.
J and K share 1/3 of $30,000 or $5,000 each.

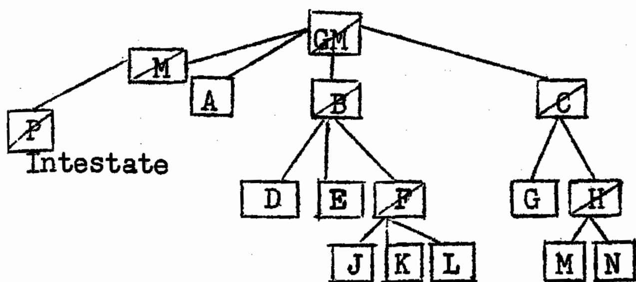
Chart 3:
Facts: P's estate - realty worth $90,000; no surviving spouse



(a) Under the old North Carolina law, strict per stirpes rule:
E takes A's share - $30,000 - 1/3 of P's estate.
F, G, H, and I take B's share - $30,000 - and divide it four ways, each taking $7,500 worth of P's realty.
J and K would take C's share - $30,000 - and split it two ways each taking $15,000.

(b) Under the new law:
E, F, G, H, I, J and K, P's living grandchildren, all related to him in equal degree, would each take 1/7 of P's estate, or $12,857.14.

Chart 4:
Facts: P's estate, $90,000; no surviving spouse; no paternal or maternal grandparents; no uncles or aunts or their lineal descendants on paternal side; no parents; no brothers or sisters or their lineal descendants.



Uncles on mother's side - B and C are dead.

1st cousins - F and H are dead.

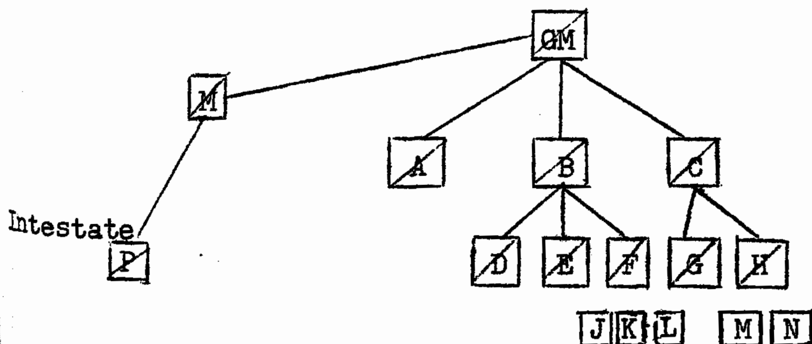
1st cousins once removed.

(a) Distribution under new law:

Uncle A, surviving, gets $30,000; leaving $60,000.
P's living first cousins - D, E and G - each gets 1/5 of $60,000, or $12,000 (total of $36,000).
The remaining $24,000 left out of the $90,000, will be divided equally - 1/5 each - to P's first cousins once removed, J, K, L, M and N. Each will get $4,800.

(b) Under the old North Carolina law (per stirpes distribution):
Uncle A gets $30,000.
D and E, living children of B, will each get $10,000 of the $30,000 B would have taken; J, K and L will each take 1/3 of F's $10,000, or $3,333.33 apiece.
The $30,000 share deceased uncle C would have taken: G gets $15,000; M and N, representing H (deceased), each takes $7,500.

Chart 5:
Facts: P's estate, $90,000; assume case identical to Chart 4 except that all of P's uncles and first cousins are dead leaving surviving him his five first cousins, once removed, J, K, L, M and N.



(a) Distribution under new law:
$90,000 equally between J, K, L, M and N, or $18,000 each.

(b) Under the old N. C. law - if personalty - same distribution. All of equal degree. If realty - per stirpes distribution and (nothing else appearing) J, K and L would share $45,000 of P's estate - $15,000 each; M and N the other $45,000, $27,500 each.

"Article 4. Adopted Children.

"§ 29-17. Succession by, through, and from adopted children. - (a) A child, adopted in accordance with Chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.

"(b) An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs, except as provided in subsection (e) of this section.

"(c) The adoptive parents and the heirs of the adoptive parents are entitled by succession to any property, by, through and from an adopted child the same as if the adopted child were the natural, legitimate child of the adoptive parents.

"(d) The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child, except as provided in subsection (e) of this section.

"(e) If a natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession."

Comment:

Purpose. This section represents a rewriting, compositely, of former G. S. 28-149, Rules 10 and 11, and G.S. 29-1, Rules 14 and 15, which respectively set forth the rights of succession by adopted children to personal and real property. Except for the addition of some clarifying language, no material changes have been made in the original excellent law, which, for the purpose of intestate succession, took the adopted child completely out of the bloodstream of his natural parents and places him entirely within that of his adoptive parents. It will be noted, however, that subsection (e) does qualify the foregoing statement in this respect: if the natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession. In other words, under such circumstances, the adopted child is put back into the bloodstream of such natural parent so as to permit inheritance by the adopted child and his heirs from the natural parent and vice-versa.

The new law applies alike to both real and personal property. Since adoption makes the adopted child the natural, legitimate child of the adoptive parents and such child could recover damages for the wrongful death of such parents, and vice-versa, it was not deemed necessary to repeal the provisions to that effect formerly found in G. S. 28-149, Rules 10 and 11.

"Article 5. Legitimated Children.

"§ 29-18. Succession by, through and from legitimated children, - A child born an illegitimate who shall have been legitimated in accordance with G. S. 49-10 or G. S. 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock."

Comment:

A. Purpose. The purposes of this section are to clarify and to broaden the rights of intestate succession by, through and from persons legitimated in accordance with G. S. 49-10 (intermarriage of parents) and G. S. 49-12 (acknowledgement by reputed father), and to establish for persons legitimated in other jurisdictions the same rights of intestate succession. This section eliminates a discrepancy between G. S. 29-1, Rule 1 ("such child and his issue") and G. S. 28-149 ("such child") by making it clear that both such "child . . . and his heirs" are included, and that they take not only from but through the parents.

B. Reasons. One born out of wedlock who is subsequently legitimated thereby sheds the shackles of illegitimacy, but rights of intestate succession by, through and from him generally depend upon the provisions of the applicable legitimation statute, a principal effect of which is to permit intestate succession as between the reputed father and illegitimate child, which is otherwise not permitted except in two states (Arizona and Oregon). Since such statutes are sometimes not broadly construed because remedial in purpose, but are narrowly construed as in derogation of the common law, the new G. S. 29-18 attempts to be broadly specific (See, Re WALLACE, 197 N. C. 334 (1920)).

C. Source. See Powell, Real Property, § 1003.

"Article 6. Illegitimate Children.

"§ 29-19. Succession by illegitimate children. - For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.

"§ 29-20. Descent and distribution upon intestacy of illegitimate children. - All the estate of a person dying illegitimate and intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of state inheritance taxes, as provided in this article.

"§ 29-21. Share of surviving spouse. - The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G. S. 29-14 for the surviving spouse of a legitimate person except:

(1) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his or her mother, a one-half undivided interest in the real property and the first ten thousand dollars ($10,000.00) in value plus one-half of the remainder of the personal property; [Amendment underlined.] or

(2) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or his mother, the surviving spouse shall take all of the net estate.

Comment: The same changes made to §29-14 were necessarily made to §29-21 relating to the share of the surviving spouse of an illegitimate for the same reasons. Since the provisions of §29-14 are largely incorporated into §29-21 by reference, only subdivision (1) of §29-21 had to be amended.

"§ 29-22. Shares of others than the surviving spouse. - Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

(1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G. S. 29-16; or

(2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G. S. 29-16; or

(3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother, she shall take the entire net estate or share; or

(4) If the intestate is not survived by such children or lineal descendants or by a surviving mother, the other children of the mother of the intestate, whether legitimate or illegitimate, and the lineal descendants of any such children who are deceased, shall take as provided in G.S. 29-16; or

(5) If there is no one entitled to take under the preceding subdivisions of this section or under G. S. 29-21, the maternal grandparents shall divide the entire net estate or if either is dead the survivor shall take the entire net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take as provided in G. S. 29-16."

Comment:

A. Purpose. The purpose of this section is to make the illegitimate

child a member of his mother's family so that he and his issue take on intestacy by, through and from his mother and his other maternal kindred, lineal and collateral, and they take from him. This pattern of succession is followed in G. S. 29-21 and G. S. 29-22 as to intestate succession from an illegitimate person by making the mother and her family his intestate successors in the absence of a surviving spouse or lineal descendants.

B. Reasons. Under the common law a child born out of wedlock was filius nullius, the child of no one, and could not inherit from his mother or father, and had no relatives except his own spouse and lineal descendants. This remains the law except as changed by statute. The modern trend is to stress the innocence of the children of unwed parents. As between mother and her illegitimate child reciprocal rights of intestate succession existed without restriction in all but three states (Louisiana, New York and North Carolina); and subject to some variations the same rule prevails as between the mother's relatives and her illegitimate child in about half of the states, but such is almost universally not sanctioned as between an illegitimate child and his reputed father and relatives of the latter.

Under former North Carolina law an illegitimate child could not inherit through its mother from her relatives, and if the mother left both legitimate and illegitimate children the latter could not inherit property which came to her from the father of her legitimate children (former G. S. 29-1, Rules 9 and 10; G. S. 28-152). The new G. S. 29-19 changed this and permits such inheritance. This change follows the Model Probate Code § 26; and See Powell, Real Property, § 1003.

"Article 7. Advancements.

"§ 29-23. In general. - If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share, shall be taken into account in computing the estate to be distributed."

Comment:

This section codifies the North Carolina case law which has consistently held that only entire intestacy, as contrasted to partial intestacy, would bring the advancement doctrine into play. See JERKINS v. MITCHELL, 57 N.C. 207 (1858).

The new law makes few substantial changes in the old law of advancements. It does, however, codify much of the present case law. It should be pointed out (as it is in Sec. 29-2 "Advancement"), the doctrine of advancements is now applicable to advancements to all heirs. However, no gift to the spouse is considered to be an advancement. It is true that most advancements will be made to the child or grandchild of the donor. But, there is no good reason why the more remote kin should

not account for gifts made to them if they would be an heir or one of the intestate's heirs.

Source: In general, Model Probate Code, Sec. 29.

"§ 29-24. Presumption of gift. A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement."

Comment: The question as to what shall be regarded as an advancement is a very difficult one. Positive characteristics of advancements are almost impossible to define. Such problems have not been made easier by certain provisions of the Internal Revenue Code which offer incentives, by way of exemptions and exclusions, to inter-vivos transfers. Thus, it seems wise to state that gratuitous inter-vivos transfers will be presumed to be absolute gifts and not advancements. The former law in North Carolina functioned on the presumption that a large amount of property transferred or money paid by the parent to the child is an advancement. However, the presumption may be rebutted if it can be shown that the parent, at the time of the transfer, did not intend such to be an advancement. The new law places the burden of proof of the advancement on the one claiming that an advancement has been made.

"§ 29-25. Effect of advancement. - If the amount of the advancement equals or exceeds the intestate share of the advancee, he shall be excluded from any further portion in the distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount of the advancement is less than his share, he shall be entitled to such additional amount as will give him his full share of the intestate donor's estate."

Comment: This section simply states the original law for determining the advancee's share of the donor's estate when it has been determined that an advancement has been made. Under the original law it was provided that child must account to the widow of the intestate for his advancement, in ascertaining her child's part of the personal property (G. S. 28-150). The new law eliminates this rather nebulous benefit.

"§ 29-26. Valuation. - The value of the property given as an advancement shall be determined as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. However, if the value of the property, so advanced, is stated by the intestate donor in a writing signed by him and designating the gift as an advancement, such value shall be deemed the value of the advancement."

Comment: Unless otherwise stated by the donor in writing, an advancement will be valued as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. See G. S. 29-27 set out below.

"§ 29-27. Death of advancee before intestate donor. - If the advancee dies before the intestate donor, leaving an heir who takes by intestate succession from the intestate donor, the advancement shall be

Sec. 2. G. S. 1-47 is hereby amended by striking out subdivision (5) thereof relating to the allotment of dower.

Sec. 3. G. S. 8-47, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the word "dower" in line 87 thereof and substituting therefor the words "a life interest in lieu of an intestate share taken under the provisions of G. S. 29-30". [Amendment underlined.]

Comment: As introduced, Section 3 of the Bill would have amended G. S. 8-47, relating to the present worth of annuities, to delete any reference to dower. In light of the addition of the election provisions in § 29-30, this section was rewritten to change the reference to dower to a reference to the election to take a life estate.

Sec. 4. G. S. 11-10 is hereby amended by striking out the words, "in laying off widows' dower," following the words, "real estate," in line three thereof and preceding the word, "in", in line four thereof.

Sec. 5. G. S. 11-11 is hereby amended by striking out the entire twenty-fourth paragraph thereof entitled, "Jury, Laying Off Dower."

Sec. 6. G. S. 28-2.1 is hereby amended by rewriting the fourth paragraph thereof to read as follows:

"The public laws relating to the administration of estates of decedents, and the Intestate Succession Act, shall apply to estates of such missing persons."

Sec. 7. G. S. 28-81 is hereby amended by striking out all of the section following the first sentence thereof.

Sec. 8. G. S. 28-170, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the words, "on allotment of dower," following the word, "commissions", in line twenty-three and preceding the word, "on", in line twenty-four thereof.

Sec. 9. G. S. 28-173, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by striking out the words, "this chapter for the distribution of personal property in case of intestacy.", in lines ten and eleven thereof, and substituting therefor the words, "the Intestate Succession Act."

Sec. 10. G. S. 49-11, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by rewriting the second sentence thereof to read as follows:

"In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock."

Sec. 11. G. S. 49-12, as the same appears in the 1957 Cumulative Supplement to the General Statutes, is hereby amended by rewriting the

second sentence thereof to read as follows:

"In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock."

Sec. 12. G. S. 52-13 is hereby amended by striking out the words, "dower, tenancy by the curtesy, and all other", following the word, "quitclaim", in line three and preceding the word, "rights", in line four thereof, and substituting therefor the word, "such".

Sec. 13. Article 5 of Chapter 45 of the General Statutes, entitled "Real Estate Mortgage Loans", is hereby amended by changing the title thereof to "Miscellaneous Provisions" and adding at the end thereof a new section to be numbered G. S. 45-45 and to read as follows:

"§ 45-45. Spouse of mortgagor included among those having right to redeem real property. Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncancelled obligation secured thereby."

Sec. 14. G. S. 28-150 through G. S. 28-152 inclusive, G. S. 30-3 through G. S. 30-8 inclusive, G. S. 30-10 through G. S. 30-14 inclusive, G. S. 46-15, G. S. 52-16, and all other laws and clauses of laws in conflict with this Act are hereby repealed.

Comment: Finally, Section 14 of the Act, the general repealer clause was amended to include the repealer of G. S. 30-8 which would have been repealed by the homesite statute and, as the old unused homesite statute, is not needed in view of new Article 8 of the Act.

Sec. 15. This Act shall become effective July 1, 1960.

In Conclusion, it will have been noted that although a number of amendments were made in the bill before enactment, largely by the subcommittees studying it, the basic structure and scheme of things drafted into the Act remain intact. Moreover, most of the amendments were well taken and effect what are worthwhile improvements in the Act. The addition of the election to take a life interest device was a novel substitute for the homesite statute which, it is believed, will work out well. The removal of the minimal monetary shares for surviving spouses was unfortunate but unquestionably necessary to save the bill in the General Assembly. Of all the amendments, the only one which causes question as to its effect is the one extending collateral succession beyond the fifth degree to prevent succession only, but it is hoped that if the Court is called on to construe its impact on the general limitation of collateral succession, it will have little difficulty in restricting the application of the escheat preventing proviso to just the situation contemplated by the movers of the amendment and not allow the proviso to frustrate the fifth degree collateral succession limitation so carefully woven into the Act.