

# Montana Law Review

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Volume 12  
Issue 1 *Spring 1951*

Article 2

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January 1951

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### Recommended Citation

J. Howard Toelle, *Succession under Montana Law*, 12 Mont. L. Rev. (1951).

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# Succession Under Montana Law

## I. TESTATE SUCCESSION

J. HOWARD TOELLE\*

The feudal principles of the common law did not admit of a disposition by will of land of freehold tenure. The basis of one's right to dispose of his property by will is, therefore, sought in modern statutes.<sup>1</sup>

In Montana, the statutes authorize three types of wills. Of least importance is the nuncupative or oral will.<sup>2</sup> A lawyer could advise its use only under very exceptional circumstances. It need not be written nor declared nor attested with any formality. However, it can only be used for personal estate. The amount bequeathed must not exceed in value \$1000. It must be proved by two witnesses who were present at the making of it, one of whom was asked by the testator to bear witness that such was his will. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death; or, decedent must have been, at the time, in expectation of immediate death from injury received the same day. The words must be reduced to writing within thirty days after they were spoken and no proof will be received unless offered within six months of the speaking of the testamentary words. Such a will is subject to all the infirmities of parol evidence. Witnesses may die, disagree, forget. It follows that such a will should not be relied on in the limited circumstances authorized by the Montana statute if a written will can be prepared.

The written wills are of two kinds as authorized in Montana. The informal holographic written will is authorized in nineteen states of which Montana is one.<sup>3</sup> Such a will is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form. Witnesses are not required. However, the courts have been rather strict in their interpretation of this

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<sup>1</sup>ATKINSON, WILLS, p. 19.

<sup>2</sup>R.C.M., 1947, § 91-118 (6991).

<sup>3</sup>R.C.M., 1947, § 91-108 (6981).

statute. In one case, a businessman used a letterhead at the top of which was printed the figures 190... He filled in as June 7, ..7, with his own handwriting. The court held that his will was not entirely dated in his own hand, and could not, therefore, be upheld under the statute.<sup>4</sup> A recent Montana case in which testator began "This day of May 1938" was held to be dated in his own hand thus indicating a more liberal tendency.<sup>5</sup>

The formal written will is the type used by most testators. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. The testator must, at the time of subscribing or acknowledging his will declare to the attesting witnesses that the instrument is his will. There must be two attesting witnesses, each of whom must sign his name as a witness, at the end of the will, at the testator's request, and in his presence.<sup>6</sup> Our statute indicates that the witness must write his place of residence with his name, but his failure to write the place of residence does not invalidate the will.

A formal written will in the testator's own hand is advantageous. It may be upheld as an informal holograph if for some reason it fails as a formal witnessed will. It guards against forgery and fraudulent substitution of pages. It tends to rebut

<sup>4</sup>In re Noyes Estate (1909) 40 Mont. 190, 105 P. 1017.

<sup>5</sup>In re Irvine's Estate (1943) 114 Mont. 577, 139 P. (2d) 489. While a holographic will may be in form a letter, the animus testandi is necessary, and words used in a letter showing an intent to make a will at some time in future in accord with contents of the letter, held insufficient in Augestad's Estate (1940) 111 Mont. 138, 106 P. (2d) 1087. And see in re Watt's Estate (1945) 117 Mont. 505, 160 P. (2d) 437, where the animus testandi was found wanting.

<sup>6</sup>R.C.M., 1947, § 91-107 (6980). Acknowledgment by testator of his signature may be by spoken words and also by circumstantial evidence. In re Bragg's Estate (1937) 106 Mont. 132, 76 P. (2d) 57. Publication of will may be by express declaration or by conduct, in re Silver's Estate (1934) 98 Mont. 141, 38 P. (2d) 277, or by intelligent acquiescence of testator in legal adviser's request to witnesses to sign testator's will, in re Miller's Estate (1908) 37 Mont. 545, 97 P. 935. But where one witness did not hear the will read, was not requested to sign as witness to a will, and was not informed until two years later as to the character of the instrument, it was held that the will was not published by testator, in re Noyes Estate (1909) 40 Mont. 178, 105 P. 1013. Mere passivity by testator is not sufficient as publication, in re William's Estate (1908) 50 Mont. 142, 145 P. 957, in re Cumming's Estate (1922) 92 Mont. 185, 11 P. (2d) 968. Testator's hand may be guided by another in the act of signing, in re Miller's Estate (1908) 37 Mont. 545, 97 P. 935, in re Sale's Estate, (1939) 108 Mont. 202, 89 P. (2d) 1043.

the charge of undue influence. It conclusively establishes the testator's knowledge of the contents of the will. However, many testators lack the education or physical ability to pen the will; some are educated but poor scribes. The task of penning is laborious if the will is lengthy; and the testator may be tempted to change the will subsequently, if originally in his own hand, with possible resulting dispute and litigation. These disadvantages are to be weighed against the advantages with the result that most formal wills are now typewritten. Since handwriting experts insist that a bare signature is sometimes difficult to identify, it has been suggested that, in any event, the testator might well write the testimonial and perhaps also the opening clause of the will.

It is salutary to write the will on one page if possible, but if more are needed all sheets should be fastened securely together before the acts of execution. All sheets must be present at the time of execution. It is well to state the number of pages in the will in the attestation clause. It is precautionary for the testator and witnesses to write their signatures or initials on the margin of each page although the statute does not so require. Erasures should be avoided. If any alterations are contemplated, it is better to re-copy the will. In any event, if an altered page is used, let the testator sign in the margin next to the change. Mention of a change may also be made in the attestation clause.

In selecting witnesses for his will, the testator might note that if he owns land in other states, sometimes three witnesses are required there. Possibly also he may move to another state before he dies.<sup>7</sup> It might, therefore, be well to do a little better than the Montana statute requires and have three witnesses attest his will. This would be helpful also if testator makes a mistake as to one of his witnesses and secures one that the law regards as incompetent or interested. The extra witness is for the purpose of our law regarded as a superfluous witness.<sup>8</sup>

<sup>7</sup>The court of the situs of the land controls as to the validity and effect of a will and the course of intestate devolution as to immovables while the law of decedent's last domicile controls as to movables. BINGHAM-COSTIGAN, *CASES ON WILLS*, p. 48. Where Montana is the law of the forum, however, R.C.M., 1947, § 91-1001 (10039) provides that wills duly proved and allowed in any other state may be allowed in any district court in Montana where testator left estate, and by R.C.M., 1947, § 91-115 (6988) wills duly executed by the law of the place where made or where testator was at the time domiciled are regulated as to the validity of execution by the law of such place.

<sup>8</sup>R.C.M., 1947, § 91-113 (6986) makes void a beneficial devise, legacy or gift to the subscribing witnesses unless there are two other competent subscribing witnesses.

In general, the testator should not select his executor, or trustee, or legatee or devisee, or heir, as a witness. Many wills have been litigated under the doctrine of "incompetent" or "interested" witnesses. It is well to select witnesses younger than the testator who therefore have a good chance of outliving him. They should be permanent in the locality; it has been said that a deceased witness is less of a problem than one who cannot be located. An unmarried woman is not so satisfactory; she may marry, change her name and so be hard to locate. A physician, a nurse, the attorney-draftsman,<sup>9</sup> a business associate, are fairly satisfactory as types of witnesses.

A satisfactory attestation clause would read something like this:

"The foregoing instrument consisting of .... pages was at the date thereof signed, published and declared by the said John Doe as and for his last will and testament in the joint presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses."<sup>10</sup>

<sup>9</sup>TRACY, THE SUCCESSFUL PRACTICE OF THE LAW, p. 90, observes as to the attorney-draftsman: "Do not hesitate to be a witness to the will unless, of course, you are a beneficiary. In fact, I do not think it unethical to assume that you are to be a witness. This continued connection with your client is valuable for two reasons: first, when the client dies and the will is found, there will be no outward identification of the drafting attorney, unless you have taken pains to fasten the will in a printed back bearing your name. Naturally, the executor will choose as his attorney the one who drafted the will. The second reason for acting as witness is that your chances of being appointed counsel for the executor are greater. You will have to appear in court, when the will is proved, as a witness, and your presence there will cause the executor to give you full consideration, lessening any tendency he might show toward the appointment of a friend."

<sup>10</sup>As an alternative the following:

"In witness whereof, I, the said John Doe, herewith set my hand to this my last will and testament, typewritten on nine sheets of paper upon the margin of each one of which I have written my name this first day of December, 1950.

(Signature) John Doe

On the first day of December, 1950, John Doe declared to us, the undersigned, that the foregoing instrument was his last will, and he requested us to act as witnesses to the same and to his signature thereon. He thereupon signed said will in our presence, we being present at the same time, and we now, at his request, in his presence, and in the presence of each other do hereunto subscribe our names as witnesses. And we and each of us declare that we believe this testator to be of sound mind and memory."

Signature.....  
Address .....  
Signature.....  
Address .....

The execution of the will should be in a room in which both the testator and all the witnesses, or at least two, are present at the time. If not a case of infirmity or a death-bed will, all would do well to congregate around a table. Let all sit down. Let the testator talk in a friendly conversational manner for a time so that the quality of his mind be apparent to the witnesses. Let the testator sign first above the attestation clause. Caution the witnesses to observe closely. Let the testator declare the instrument to be his will. Let him request the witnesses, naming them, to witness his will. Read the attestation clause; allow the witness to read it. Let the witnesses sign below the attestation clause. Caution the testator and the witnesses to observe this in order to impress the matter on the minds of the witnesses. It should be noted that the witnesses to the will are not the only ones who can give evidence in court as to what took place; they are good witnesses usually because of their near opportunity to observe; others present may, however, also testify. The Montana statute does not in terms require mutual presence. However, the same reasoning applies here as to the three witnesses. If the testator moves to another state, or has land elsewhere, his will may be upheld where otherwise it would require revision or be ineffective.

There are many litigated cases on the meaning of "presence." The witness must be in the testator's presence when he signs his name. The sense of sight is the test usually insisted upon by the courts. Some cases have been decided on the sense of hearing, but since the sense of sight is the orthodox view, it is inadvisable to allow a witness to attest when the testator's back is turned, when he is on a sick bed in the next room, or when a curtain intervenes between the testator and witnesses in the same room. So the suggestion is made that all sit down around the table where all can observe the steps in the execution of the will.

In planning a will, consider well the one to nominate as executor; otherwise the court appoints an administrator (sometimes a politician). One may wish to give instructions as to burial, as to the payment and collection of debts, as to the disposition of personal property, as to the disposition of realty, as to the disposition of any residue in a general residuary clause.

The shrinkage of assets in recent times and the increasing role of taxation has made it necessary to reconsider wills drawn some years ago. If some years ago one gave in terms of specific amounts rather than percentages to charity and those in whom he was more remotely interested, leaving to those nearer to him

(say his wife and children) residue interests which he formerly thought to be substantial, possibly allowing for taxation, they are not so at the present time. Look well to the will and keep it up to date. Wills are ambulatory and revocable taking effect only at death; thus they may be changed at will by revocation, substitution, addition. Older wills gave outright to the widow a share of a man's estate and distributed the balance to children. Many later wills are giving the widow a life income from part or all of the estate with stipulation that if the income is insufficient for her needs, she is to receive payments out of the principal. In providing for a daughter, the testator may not have too much confidence in the business judgment of her husband, or having it, may not wish to take the chance that should she die first her share of his estate might pass out of the family entirely. The age of the testator's son and/or his lack of business experience may dictate special protection for him. In matters of this kind, the testator may desire to invoke the law of trusts. He must then decide whether he wishes a corporate or an individual trustee to carry out the trusts provided in his will. There are advantages and disadvantages to consider either way. An executor serves only long enough to close out an estate by legal process and turn it over to the beneficiaries or to the trustee as directed in the will. A trustee, after receiving part or all of an estate from the executor holds and manages it until such time as the will directs final distribution. But whether one's estate requires application of the law of trusts or of the law of wills in the absence of trusts, it is well to remember that one's will is one of the most important documents to which the owner's signature will ever be affixed. Therefore, whether simple or complex, a good rule is to consult a lawyer.

Should a person leave a will or rely on the intestate law? In the Georgia case of *Reed v. Roberts*, Judge Lumpkin writing in 1858 observed as follows: "Why a desire to favor the wills of testators made in extremis should exist in this state we do not understand. Ordinarily, our statute of distribution makes the fairest disposition of a dead man's property."<sup>4</sup>

Students of the present scene would hardly agree. In enacting a general succession statute, the legislature would presumably set up an average man with an average estate. The property interests of this man would be of a usual type. He would have a usual number of relatives of relatively the same needs and well-disposed one to another. The distribution of his

<sup>4</sup>(1858) 25 Ga. 294.

estate would then be presumably the fairest and most equitable that the legislature could make it. Actually, our state statutes are the result of considerable imitation following a pattern that goes back for many of the details to the hoary days of Charles the Second. And actually, the average-man decedent rarely exists especially under modern conditions. The succession law is least successful in very small or very large estates.

Some types of property need special attention and maybe special allocation to one or more individuals who have previously had some connection with it. It may be a speculative land venture, a small private business, an investment in common stocks. Some of the would-be statutory distributees are already well-fixed, others have not prospered so well. Maybe, the son dies, and father-in-law, much attached to daughter-in-law, finds the latter cut off from the salary check of the husband and with little financial ability to weather the years ahead.

The division of personal effects, bric-a-brac, autos, jewelry, pictures, etc., may lead to ill-feeling in an otherwise fine family relationship especially when left to the women-folk as it usually is. Thus, there is need of a will specifically allocating such articles or providing for their sale with all family members allowed to bid. Where decedent leaves a widow and minor children, a will passing the whole estate to the widow will avoid litigious and expensive guardianships for the minors. Perhaps the father has a son who is notoriously unable to handle money wisely and special trust protection for him may be needed in the will. And in large estates especially, a simple and flexible trust may provide protection against payment of unnecessary estate and inheritance taxes.

There are additional considerations, to-wit:

1. A will increases the importance of the individual at the expense of the family; the claims of members of the family are not equally powerful; the individual may have inherited part; other parts he may have acquired by his own efforts.

2. The owner may will his property to persons who will turn it to best account; otherwise, it is a matter of chance.

3. And the public should be interested. Masses of property may remain undivided if the owner wills it; it may thus be used for the building and maintenance of hospitals, schools, research foundations, charities, and so be devoted to beneficent, cultural, scientific and artistic purposes.



## II. INTESTATE SUCCESSION

## ALSO HEREIN WAYS OF AVOIDING PROBATE

What happens to the property of a decedent when he leaves no will? In other words, how does property descend under the laws of intestate succession in Montana?

Generally, probate of an estate is deemed necessary whether the deceased left a will (i.e. died testate) in which case probate is absolutely necessary, or died without making a will (i.e. intestate) in which case probate can sometimes be dispensed with. However, some people have a superstition against wills, thinking they may somehow hasten one's demise. Some have a feeling that probate is expensive, and that it involves considerable delay during the period of a year to fourteen months or longer that an estate is in process of settlement and distribution in the courts. Accordingly, certain devices for avoiding probate have been tried. Some are legal; some are extra-legal and perchance illegal.

An extra-legal scheme is to rent a safe deposit box, and to tell the other person (intended beneficiary) to go upon the owner's death to the box and take charge of the money, jewels, or securities to be found therein. This plan may succeed in some cases though extra-legal. If there are parties interested in contesting, however, such as creditors or distributees, they may have an administrator appointed, and severe penalties may follow for evasion of inheritance taxes. The transaction is not a gift since the required delivery is lacking in the lifetime of the deceased.

By insurance on one's life, payable to a designated beneficiary, one may reduce his estate so that little or nothing will be left for probate. And in Montana, he can put as much into insurance as \$500 in annual premiums will buy free from the claims of creditors.<sup>12</sup> Being in the nature of an exemption, this can be done legally when diversion of funds otherwise might be regarded a fraudulent conveyance as against creditors in that the owner is insolvent or that the premium payment renders him insolvent.

Joint estates in both realty and personalty thereby permitting the surviving tenant to take without judicial administration have often been upheld. A bank account payable to the survivor of the depositor and another have been held to create joint estates on the theory of a gift, a trust, or a contract; the latter theory of a contract between the depositor and the bank

<sup>12</sup>R.C.M., 1947, § 93-5814 (9428).

for the benefit of the donee as a third party beneficiary in case he survives is preferable.<sup>33</sup>

Deeds are often used to avoid probate. Delivery in the grantor's lifetime is necessary for the validity of a deed, but this delivery may be to a third person with instructions to him to give it to the grantee upon the grantor's death. The grantor must give up all control over the instrument to have a valid delivery. A delivery to a third person with instructions to give the deed to the grantee upon the happening of a certain event not within the grantor's control should be valid though there are conflicting decisions. Sometimes husband and wife have made out deeds, each conveying his or her own property to the other under an understanding that upon the death of one of the spouses, the deed of that spouse will be recorded by the other. This is also an extra-legal method and can succeed only if there are no parties interested in contesting. In such case, there has been no valid and irrevocable delivery of either deed during the lifetime of the respective grantors.

By the device of gifts *causa mortis*, by the use of a trust as a substitute for a will and to avoid probate, and by contracts, assignments, and negotiable instruments, probate has often been avoided in whole or in part. Perhaps the item of expense has been over-emphasized and sometimes, too, devices to avoid probate are most expensive in the end because they lead to litigation. In any event, property owners would do well to seek very competent advice before resorting to a device to avoid probate.

The objection that considerable delay is involved in the administration of an estate at a time when survivors are faced with the necessity of immediate financial readjustment, especially for the loss of the breadwinner in cases of small estates, is not so easily answered. Remedial legislation is here necessary. All jurisdictions would do well to imitate our Montana statutes<sup>34</sup> allowing estates not to exceed \$1500 in value to go to the wife and children after payment of expenses of the last illness, funeral charges, and expenses of administration without further proceedings in administration; also for estates not exceeding \$3000, a summary administration and order of distribution within six months of the issuance of letters is provided, creditors having only four months after the first publication of notice to present their claims.

<sup>33</sup>ATKINSON, *Supra*, note 1, p. 126.

<sup>34</sup>R.C.M., 1947, § 91-2406 (10149). And see R.C.M., 1947, § 91-623 (10012) empowering the Public Administrator to settle summarily estates of less than \$500 in value without the issuance of letters to him.

However, for estates of over \$10,000 in value, creditors of the estate are entitled to ten months from the first publication of notice within which to present their claims which means that the estate is not usually settled up at any rate until about twelve to fourteen months from the death of the deceased.<sup>15</sup>

The succession to property in Montana in the absence of a will is quite definitely set forth in our statutes. By the Civil Code, the widow is endowed of the third part of all lands whereof her husband was seized of an inheritable estate at any time during the marriage unless she relinquished her dower right in legal form.<sup>16</sup> The husband cannot defeat this interest by making a will since the wife, by a subsequent section,<sup>17</sup> may elect whether she wishes to take or renounce any provision for her in the will or take her dower in the husband's land as provided in the preceding section. Also, whereas the wife's dower comes out ahead of the husband's debts, the wife may, in case the husband left no children nor descendants of children, elect to take one-half of all the realty remaining after the payment of the husband's debts.<sup>18</sup> In addition to her dower right, the wife is also an heir of her husband by Montana law, and under our general succession statute<sup>19</sup> is allowed to share in other property of her husband.

The husband no longer has the common law estate of curtesy in the wife's real property in case she dies first, this estate having been abolished by the Montana Code.<sup>20</sup> However, a husband is an heir of his wife's property under our general succession statute.<sup>21</sup>

A child is not in the same favored position as is the wife. Either father or mother could make a will cutting off entirely the expectant interest of a child. However, by our Code, if the testator omits to provide for his children in his will, the children will take the same share as on intestacy unless it appears that the omission was intentional.<sup>22</sup>

Succession to and distribution of both real and personal property is in Montana regulated by the provisions of our Code under the following categories.<sup>23</sup>

<sup>15</sup>R.C.M., 1947, § 91-2702 (10171).

<sup>16</sup>R.C.M., 1947, § 22-101 (5813).

<sup>17</sup>R.C.M., 1947, § 22-107 (5819).

<sup>18</sup>R.C.M., 1947, § 22-109 (5821).

<sup>19</sup>R.C.M., 1947, § 91-403 (7073).

<sup>20</sup>R.C.M., 1947, § 36-131 (5812).

<sup>21</sup>*Op. Cit.*, note 17, *supra*.

<sup>22</sup>R.C.M., 1947, § 91-136 (7009).

<sup>23</sup>R.C.M., 1947, § 91-403 (7073).

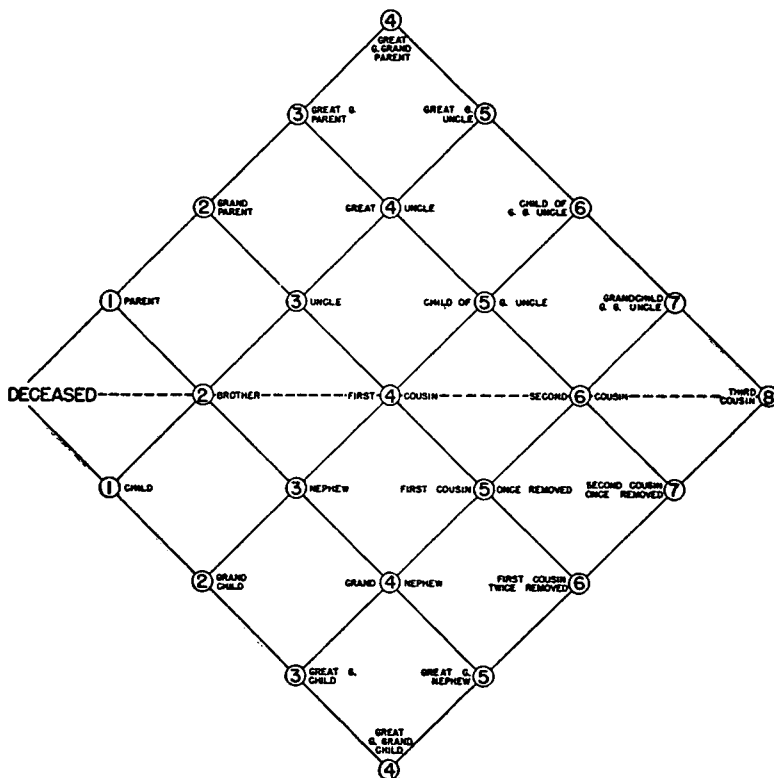
- I. If decedent leaves a spouse and one child (or lawful issue of the child)—equal shares go to each, or  $\frac{1}{2}$  to the spouse and  $\frac{1}{2}$  to the issue.
- II. If decedent leaves a spouse and more than one child living, or, one child living and the lawful issue of one or more deceased children,— $\frac{1}{3}$  goes to the spouse, and the remainder in equal shares to the children, and to the lawful issue of any deceased child by right of representation. If no child is living at the death of intestate, the remainder goes to all of his lineal descendants. If all the descendants are in the same degree of kindred to the decedent, they take equally; otherwise according to the right of representation.
- III. If intestate leaves no spouse, but leaves issue, the whole estate goes to the issue. If the issue consists of more than one child living, or one child living, and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.
- IV. If intestate leaves no issue, the whole estate goes to the surviving spouse.<sup>44</sup>
- V. If intestate leaves neither issue nor spouse, the whole estate goes to father and mother in equal shares, or if either is dead, then the whole to the other.
- VI. If intestate leaves no issue, nor spouse, nor father nor mother, then intestate's brothers and sisters take equally, and the children of any deceased brother or sister take by right of representation.
- VII. If no issue, spouse, father, mother, brother nor sister survive decedent, then the estate goes to the next of kin<sup>25</sup> in equal degree excepting that of two or more collaterals in equal degree who claim through different ancestors, those claiming through the nearest ancestors will take the estate. For example, a nephew would come in ahead of an uncle. Since by express

<sup>44</sup>The Montana statutes were taken from California. § 223, California Probate Code, 1949, continues the law as formerly in Montana that one-half goes to the spouse and one-half to parents or if both are dead to their issue. Montana changed in 1941 giving all to the spouse in line with the tendency for better provision for the widow. *Laws of Mont.*, 1941, p. 253.

<sup>25</sup>See in re Warnock's Estate, (1940) 36 Cal. App. (2d) 464, 97 P. (2d) 831 where half-blood brothers were not excluded in favor of nephews of the full-blood since they are not in the same degree though the nephews were allowed to take per stirpes the share their father would have taken had he lived.

statutory proviso,<sup>28</sup> Montana follows the civil law method of reckoning consanguinity, the following chart is helpful in determining who are next of kin under the statutory succession provision in point here.

**Degrees of Consanguinity  
Computation by the Civil Law**



Where "brother" appears, read "brother or sister"; where "uncle" appears, read "uncle or aunt"; where "nephew" appears, read "nephew or niece." The first cousin is the cousin german.

<sup>28</sup>R.C.M., 1947, § 91-410 (7080).

- VIII. If decedent leaves several children or one child and the issue of one or more children and the surviving child dies under age and not having married, all the estate that came to the deceased child by inheritance from the decedent descends in equal shares to the other children of the same parent, and to the issue of such other children who are dead, by right of representation.<sup>27</sup>
- IX. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parents descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share equally; other wise they take according to the right of representation.
- X. Finally, if the intestate leaves no husband, wife nor kindred, the estate escheats to the state.

In the interpretation of the above statute, an illegitimate child is an heir of the person, who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of the child, and in all cases is an heir of the mother.<sup>28</sup> Also, kindred of the half blood inherit equally with those of the whole blood of the same degree, unless the inheritance comes to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor are excluded from the inheritance.<sup>29</sup>

This hasty sketch of our intestate succession statutes will indicate that nice questions of interpretation will sometimes arise making an order of distribution in probate quite essential. If debts are owed to the estate, debtors will rightly feel that there is risk in making payment to a relative in the absence of administration. A creditor of the estate is one entitled to administration

<sup>27</sup>See in re Georget (1928) I.D.L.R. 230, where a Saskatchewan Court construing a similar statute held administration of the infant son's estate unnecessary as to shares of the infant in both his father's and his grandfather's estates, but this being ancestral property, it would go to brothers and sisters of the infant rather than to his mother. This vestigial survival of the feudal ancestral property doctrine would be eliminated under the recommended Model Probate Code. See note 33, SIMES, MODEL PROBATE CODE, § 22.

<sup>28</sup>R.C.M., 1947, § 91-404 (7074).

<sup>29</sup>R.C.M., 1947, § 91-411 (7081). The half-blood ancestral property limitation would be eliminated under the recommended Model Probate Code. See note 33, SIMES, MODEL PROBATE CODE, § 24.

by our statutes if those in more preferred categories do not apply.<sup>30</sup> As a result, administration and probate is the normal way. Notwithstanding, it is estimated that there is only one administration for every four deaths. Ruling out infant deaths and those who die penniless, it appears that in about half of the cases in which people leave some property, it is found possible somehow to avoid administration.<sup>31</sup> If the decedent is farsighted to the end of avoiding administration, or if his estate is not large or complicated, and if the beneficiaries are willing to cooperate among themselves and make fair adjustments of decedent's debts, there is a fair chance that administration can be avoided. But if the title to valuable property is still in decedent at death, the interested heirs or next of kin should be advised that they take risks in attempting to avoid administration. An administration, with due facilities for creditors to present claims, is the only certain way of determining that there are no unpaid claims. The non-claim statutes do not run until an administrator is appointed and gives notice by publication for creditors to present their claims. We must, therefore, usually have administration in order to establish the facts which render it unnecessary. And if deceased left a will, probate is absolutely essential for statutes usually make it a criminal offense to suppress a will.<sup>32</sup>

### III. A LOOK AHEAD—THE MODEL PROBATE CODE

Recently, specialists in the field of estates have drawn up a Model Probate Code for the Real Property Section of the American Bar Association.<sup>33</sup> While not yet fully adopted anywhere, the Code represents a body of well-informed thinking as to desirable legislation. It is a matter of satisfaction to us in Montana that in the organization and administration of the work of probate in our District Courts, and in our provisions for summary administration of small estates, we are in a favorable comparative position—especially with states farther east; in fact we parallel closely the organization recommended in the Model

<sup>30</sup>R.C.M., 1947, § 91-1401 (10068). The preference order is as follows: The spouse or a competent person requested by the spouse, the children, father or mother, brothers, sisters, grandchildren, next of kin entitled to distribution, public administrator, creditor, any person legally competent.

<sup>31</sup>ATKINSON, *supra*, note 1, p. 358.

<sup>32</sup>Under R.C.M., 1947, § 91-1801 (10020), the custodian must within 30 days of receipt of information of the death of the maker deliver the will to the district court; otherwise he is responsible for all damages sustained by anyone injured thereby.

<sup>33</sup>SIMES, MODEL PROBATE CODE (Callaghan 1946).

Code.<sup>34</sup> And on types of wills, and the formalities of execution and revocation of wills by the testator, our statutory system is not dissimilar.<sup>35</sup> On revocation by change of circumstances, however, the Model Code introduces greater certainty into revocation by operation of law permitting only one type, namely divorce, and then to the extent of provisions in the will in favor of the testator's spouse.<sup>36</sup> It is in the provision for the spouse that the Model Code would drastically change most present day statutes including those in Montana. Dower and curtesy are abolished; these estates are said to "tend to clog land titles and make alienation more difficult."<sup>37</sup> Also today so much of the wealth of a decedent is likely to be in the form of bonds and shares that these estates are not deemed to make adequate provision. Accordingly, the Model Code would give the surviving spouse one-half the net estate if the intestate is survived by issue or the first \$5000 and one-half of the remainder of the net estate if there is no issue but intestate is survived by one or more parents or brothers or sisters or their issue, or all of the net estate if there is no issue nor parent nor issue of a parent.<sup>38</sup> The spouse could also elect against a will to take the share that would have passed to him had the testator died intestate up to \$5000 and one-half of any residue that would have passed had the testator died intestate.<sup>39</sup> The Model Code would also permit the half-blood to inherit the same share as if of the whole blood.<sup>40</sup> An adopted child would be treated fully as if a natural child of the adoptor for purposes of inheritance and would cease to be treated as a child of the natural parents for this purpose.<sup>41</sup> While in Montana, the illegitimate may inherit from the mother but not from her kindred, lineal or collateral, the Model Code would allow the illegitimate and his issue to inherit from the mother and her kindred, both descendants and collaterals; and they could inherit from

<sup>34</sup>*Ibid.*, § 61ff, p. 89.

<sup>35</sup>*Ibid.*, § 45.

<sup>36</sup>*Ibid.*, § 53. Compare R.C.M. § 91-126 (6999) with R.C.M. § 91-129 (7002) marriage. Montana has no code section on revocation by divorce. Courts generally hold that divorce is not a revocation unless accompanied with a property settlement. ATKINSON, *supra*, note 1, p. 45.

<sup>37</sup>*Ibid.*, § 31.

<sup>38</sup>*Ibid.*, § 22.

<sup>39</sup>*Ibid.*, § 32. An alternative plan closely patterned after the New York and Massachusetts legislation and limiting the wife to life interests is provided.

<sup>40</sup>*Ibid.*, § 24.

<sup>41</sup>*Ibid.*, § 27. By decisional law, the adoptee is not generally allowed to inherit from the ancestral or collateral kin of the adopter, and his blood relatives rather than his adoptive parents take from him. BINGHAM-COSTIGAN, *CASES ON HILLS*, p. 59.



him.<sup>42</sup> It is interesting also that in its provisions for representation, the Model Code makes no distinction between ancestral and non-ancestral estate, real or personal,<sup>43</sup> and that it makes realistic provisions for carrying out the testator's probable intent as to pretermitted children.<sup>44</sup> It is suggested that we would do well to study our Montana statutes alongside the recommended Model Probate Code, and make such changes from time to time as are necessary to keep our succession law abreast of modern needs.

<sup>42</sup>*Ibid.*, § 26; compare R.C.M., 1947, § 91-404 (7074).

<sup>43</sup>*Ibid.*, § 22.

<sup>44</sup>*Ibid.*, § 41. Under R.C.M., 1947, § 91-135 (7008), a child born after the will was made either in the lifetime of testator or after his death takes as on intestacy unless the child is provided for by some settlement or in the will or is so mentioned in the will as to show testator's intent not to provide for it. And if testator omits to provide for other children, they take as on intestacy unless it appears that this omission was intentional. It has been held in Montana that as to these other children evidence dehors the will may be used to show the omission to have been intentional. In re estate of Peterson (1914) 49 Mont. 96, 140 P. 237. But by § 41 of the Model Code, a child born or adopted after the will was made would take an intestate share, unless it appeared from the will that the omission was intentional, or unless when the will was executed testator had one or more children known by him to be living and devised substantially all his estate to his spouse; if, however, when the will was made, testator believed any child to be dead and omitted provision for him, he would take an intestate share unless from the will or other evidence it appeared that testator would not have devised him anything had he known him to be living. Since the theory of pretermitted child statutes is not to force a moral obligation on the parent, but rather to carry out testator's probable intent, it is believed that the Model Code better fulfills this purpose than do most present-day statutes.