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## A Comparison of Article II, Section 5 through 9 of the Uniform Probate and the Revised Codes of Montana: Principally the Execution, Revocation, and Construction of Wills

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## ARTICLES

### **A COMPARISON OF ARTICLE II, PARTS 5 THROUGH 9 OF THE UNIFORM PROBATE CODE AND THE REVISED CODES OF MONTANA: PRINCIPALLY, THE EXECUTION, REVOCATION, AND CONSTRUCTION OF WILLS**

Lester R. Rusoff\*

#### *INTRODUCTION*

The draftsmen of the Uniform Probate Code did not invent new procedures but adopted them from present practices of various jurisdictions. The Code does, however, represent, for Montana, a novel approach to the execution and probate of wills and the administration of estates. The U.P.C. is intended to replace the formality of the older procedures with greater flexibility. The scope of this article is limited to a segment of the U.P.C. and will deal with such subjects as the requirements for execution of wills and the rules of construction.<sup>1</sup> It is the purpose of this article to use these subjects to illustrate the attitudes and goals of the draftsmen of the U.P.C.

The draftsmen appear to have had three main goals. The first is to dispense with needless formalities. The concern here is with those formalities which tend to prevent the probate of a will, even though it obviously expresses the intent of the testator and does not demonstrate evidence of fraud. To remedy this, the U.P.C. allows for greater liberality in such things as the execution of wills and the admissibility of evidence relating to the testator's intent.

The second goal is to supply authority that is commonly lacking in both the statutory and case law of many states. An example is the provision in the U.P.C. relating to facts of independent significance. The U.P.C. also settles the applicability of anti-lapse statutes to class gifts.

Finally, the third goal is to incorporate more modern attitudes into the law. This goal is evidenced by the provisions relating to half-blood relatives, implied exercise of powers of appointment, the use of interested witnesses, and the renunciation of succession. The U.P.C. also removes the distinction between bequests and devises and defines the term "devise" to apply to personal property as well as real property.<sup>2</sup>

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<sup>1</sup>The article deals with Parts 5 through 9 of Article II of the UNIFORM PROBATE CODE [hereinafter cited as U.P.C.]. This material is an outgrowth of a panel of lawyers which was presented on June 22, 1973, at the annual meeting of the Montana Bar Association.

<sup>2</sup>U.P.C. § 1-201.

U.P.C. 2-501. WHO MAY MAKE A WILL.

Revised Codes of Montana, 1947 [R.C.M.] equivalent: 91-101.

The provisions of the R.C.M. and the U.P.C. are similar, except that the U.P.C. forecloses a question raised by the R.C.M. R.C.M. 91-101 requires a testator to be "over the age of eighteen years," thus raising a question as to when a testator is "over" that age. U.P.C. 2-501 avoids this question by providing that "Any person 18 or more years of age who is of sound mind may make a will."

U.P.C. 2-502. EXECUTION.

R.C.M. equivalent: 91-107.

U.P.C. 2-502 dispenses with several requirements of R.C.M. 91-107:

1. R.C.M. 91-107 requires that a will be "... subscribed at the end. . . ." U.P.C. 2-502 requires that a will be "signed" but does not require that it be "subscribed" or that it be "subscribed at the end." Thus, under U.P.C. 2-502, the name of the testator, appearing anywhere in his will, can serve as his signature if he intended it to do so. In this respect, U.P.C. 2-502 is comparable to R.C.M. 91-108, which states the present requirements for holographic wills.
2. R.C.M. 91-107 requires that a testator's signature be made in the presence of the attesting witnesses. U.P.C. 2-502 does not. U.P.C. 2-502 does, however, require that the witnesses have witnessed either the signing or the testator's acknowledgment. Can one witness a signing unless the signature is, in fact, made in his presence?
3. R.C.M. 91-107 requires that a testator "declare" to the witnesses that the instrument is his will. U.P.C. 2-502 does not. Under U.P.C. 2-502, the witnesses need not know that the instrument is a will, if the testator asks them only to witness his signature or his acknowledgment of his signature.
4. U.P.C. 2-502 does not require that the witnesses sign at the end of the will.
5. U.P.C. 2-502 does not require that a testator have requested the witnesses to sign. This should avoid litigation about a question of fact as to whether a testator expressly or by acquiescence in the act of another requested the witnesses to sign.
6. U.P.C. 2-502 does not require that witnesses sign in the presence of a testator. This should eliminate litigation about whether witnesses signed in the testator's sight or in his "conscious presence."<sup>3</sup> It should tend to avoid the invalidity that is likely

to occur when a lawyer who drafted a will does not supervise its execution.

U.P.C. 2-503. HOLOGRAPHIC WILL.

R.C.M. equivalent: 91-108.

U.P.C. 2-503 dispenses with certain requirements of R.C.M. 91-108:

1. U.P.C. 2-503 does not require that a holographic will be "entirely" in the handwriting of the testator but only that the signature and "material provisions" be in his handwriting. Previously, attempted wills have been held invalid because the testator intended to treat printed matter as part of his will. This has occurred even though printing could have been ignored without affecting the substance of the provisions.<sup>4</sup>
2. The U.P.C. does not require that a holographic will be dated. This should avoid litigation as to whether a partial date, like "June 1973," is sufficient.<sup>5</sup> On the other hand, lack of a date may increase the difficulty of dealing with alleged incapacity and raise questions as to order of execution of several testamentary documents. R.C.M. 91-107 does not require that a formal will be dated, but presumably formal wills are usually dated.<sup>6</sup>

U.P.C. 2-504. SELF-PROVED WILL.

R.C.M. equivalent: None.

This elective provision, if used, makes unnecessary the production of witnesses when a will is being probated. Under U.P.C. 3-303, production of witnesses is unnecessary if a will is probated informally, so the purpose of U.P.C. 2-504 is to make it possible to avoid producing witnesses if a will is probated formally. U.P.C. 2-504 enables a testator to avoid contest as to proper execution after he is dead, by permitting

<sup>4</sup>*In re Noyes' Estate*, 40 Mont. 190, 105 P. 1017 (1909) rejected an instrument offered as a holographic will, because the figures "190" in the date were printed. For the conflict as to whether an instrument may be probated as a holographic will if printed matter in it can be ignored without destroying the sense of the instrument, see ATKINSON, *supra* note 1 at 357-359.

<sup>5</sup>*In re Irvine's Estate*, 114 Mont. 577, 139 P.2d 489 (1943) held that statement of the month and year, without the day, is sufficient dating. *Estate of French*, 137 Mont. 228, 351 P.2d 548 (1960) held that statement only of the year is insufficient.

<sup>6</sup>The U.P.C., § 2-503 (1969) will leave open to litigation the question of whether a decedent intended a particular writing as his will. Some Montana cases have denied probate for lack of the required intent. *Estate of French*, 137 Mont. 228, 351 P.2d 548 (1960); *In re Hanson's Estate*, 126 Mont. 522, 254 P.2d 1073 (1953); *In re Watts' Estate*, 117 Mont. 505, 160 P.2d 432 (1945); *In re Augestad's Estate*, 111 Mont. 138, 106 P.2d 1087 (1940); *In re Noyes' Estate*, *supra*, note 4. In the *Watts'* case, the court said, apparently quoting 1 ALEXANDER ON WILLS, §§ 46-47, ". . . if the maker of an instrument did not intend by that particular paper to dispose of his property . . . such instrument must be denied probate . . . no matter how clearly it may conform to the intentions of the maker. . . ." Other Montana decisions appear to be inconsistent with this principle. *In re Van Voast's Estate*, 127 Mont. 450, 260 P.2d 377 (1954); *Marney v. Hayes*, 11 Mont. 571, 29 P. 282 (1892).

him, while alive, to settle propriety of the execution. U.P.C. 2-504 does not prevent contest on grounds other than lack of proper execution.

Under U.P.C. 2-504, a will can be self-proved by acknowledgment by the testator and affidavits of the witnesses made before a notary public. U.P.C. 2-504 states the form and contents which must, in substance, be used. It is similar to a typical attestation clause and recites that the various requirements of the statute have been met. Curiously, the suggested form recites that the witnesses signed in the presence and hearing of the testator, although U.P.C. 2-502, on execution of wills, does not expressly require such signing.

U.P.C. 2-505. WHO MAY WITNESS.

R.C.M. equivalent: 91-113, 91-114.

U.P.C. 2-505 completely liberalizes the law as to witnesses to wills. Under U.P.C. 2-505(a), any person generally competent to be a witness may witness a will, and under 2-505(b) the fact that a devisee is a witness does not invalidate any part of the will. R.C.M. 91-113 invalidates a testamentary gift to an interested witness unless there are two other competent witnesses. R.C.M. 91-114, however, allows an interested witness to take the lesser of the testamentary gift to him or what he would receive if the will were not established.

U.P.C. 2-506. CHOICE OF LAW AS TO EXECUTION.

R.C.M. equivalent: 91-115, 91-116.

These sections are designed to allow probate in Montana of wills which were properly executed under foreign law but not under the law of Montana. U.P.C. 2-506 is generally similar to R.C.M. 91-115 and 91-116, but may be broader, as it would validate a will executed, in another state and according to the law of that state, by a person then domiciled in Montana; that may not be the effect of R.C.M. 91-116.

U.P.C. 2-507. REVOCATION BY WRITING OR BY ACT.

R.C.M. equivalent: 91-122, 91-125.

U.P.C. 2-507 is generally similar to R.C.M. 91-122. U.P.C. 2-507 does, however, seem to say that part of a will can be revoked by inconsistency. Under R.C.M. 91-122, it is reasonably clear that part of a will can be revoked by a later instrument expressing intent to revoke that part of a prior will or by an act directed to that part. R.C.M. 91-115, however, does not indicate clearly whether there can be partial revocation by inconsistency; its language suggests that a later will which is only partly inconsistent with a prior will does not revoke any part of the prior will but merely supersedes it in part, so long as the later will itself is not subsequently revoked.

U.P.C. 2-507 does not contain a provision like that in R.C.M. 91-122 which indicates that a will can be revoked, in addition to revocation by a written will, by an “. . . other writing of a testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator. . . .” This provision of R.C.M. 91-122 may be intended to avoid litigation as to whether a subsequent instrument is a will if it purports to do nothing but revoke an existing will.

U.P.C. 2-507, unlike R.C.M. 91-122, does not exclude revocation by means not expressly provided by statute. However, U.P.C. 2-508 covers this point.

U.P.C. 2-508. REVOCATION BY DIVORCE; NO REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

R.C.M. equivalent: None.

U.P.C. 2-508 provides that a later divorce or annulment, but not a decree of separation, revokes any provision making a devise or appointment in favor of the former spouse, any provision giving the former spouse a power of appointment, and any nomination of the former spouse as executor, trustee, conservator or guardian, unless the will, in which the provision or nomination was made, provides otherwise. The will then takes effect as if the former spouse had failed to survive the decedent. Remarriage of the decedent and the former spouse revives provisions and nominations revoked by this provision.

U.P.C. 2-508 provides that no other change of circumstance revokes a will. Because of this provision, U.P.C. 2-508 is inconsistent with R.C.M. 91-127, 91-128, 91-129, and perhaps 91-133, which deal with revocation by marriage, marriage and the birth of issue, or a conveyance; if the U.P.C. is adopted, presumably those provisions will be repealed. U.P.C. 2-508 may also render R.C.M. 91-130, 91-131, and 91-132 unnecessary or require modification of them.

U.P.C. 2-508 does not mention property settlements and therefore presumably does not depend on the making of a property settlement. U.P.C. 2-204, however, among other things does provide that a property settlement made after or in anticipation of a separation or divorce is a renunciation of benefits that would have otherwise passed from the other spouse by virtue of the provisions of a will made before the property settlement.

U.P.C. 2-509. REVIVAL OF REVOKED WILL.

R.C.M. equivalent: 91-126.

U.P.C. 2-509(a) is roughly similar to R.C.M. 91-126 in providing that, if a testator makes a will, later executes a second will which revokes the first will, and still later revokes the second will, the first

will does not automatically revive. Both U.P.C. 2-509(a) and R.C.M. 91-126 do treat the first will as revived, under some circumstances. R.C.M. 91-126 treats the first will as revived only if ". . . it appears by the terms of such revocation . . ." of the second will that the testator intended to revive the first will or if the testator republishes the first will. Presumably, republication of the first will would make it effective, regardless of R.C.M. 91-126, so the critical provision here relates to a finding of intent to revive from ". . . the terms of such revocation. . . ." The quoted phrase seems to refer to the terms of a written instrument which revokes the second will. Presumably, therefore, oral declarations of intent to revive the first will would be insufficient to satisfy R.C.M. 91-126.

U.P.C. 2-509(a) is more liberal than R.C.M. 91-126 as to evidence of intent to revive. It permits a finding of such intent from the circumstances of a revocation or a testator's contemporary or subsequent declarations. Perhaps this liberality is explicable by the fact that a testator's oral declarations are admissible as to his intent to revoke a second will, if he revoked it by an act;<sup>7</sup> his oral statement showing intent to revoke a second will may likely, as a matter of fact, also show his intent to revive a first will.

U.P.C. 2-509(b), like R.C.M. 91-126, leaves a first will revoked if a second, revoking will is revoked by a third will, except to the extent the terms of the third will show intent that the first will be effective.

U.P.C. 2-509(a), curiously, speaks of a second will ". . . which, had it remained effective at death, would have revoked the first will. . . ." This may imply that a subsequent will revokes a prior will only at the death of the testator. Probably the draftsman did not intend this implication. If a revoking will does not revoke a prior will unless and until the testator dies without revoking the revoking will, there seems to be no need for a provision dealing with revival of a first will on revocation of a second, revoking will.<sup>8</sup>

U.P.C. 2-510. INCORPORATION BY REFERENCE.

R.C.M. equivalent: None.

U.P.C. 2-510 states the common law doctrine that a will may incorporate by reference an existing document, if the will sufficiently identifies the other document and shows intent to incorporate it.<sup>9</sup> Montana appears to have no statute adopting this doctrine, except to the

<sup>7</sup>ATKINSON, *supra* note 3 at 441-442.

<sup>8</sup>There seems to be a conflict as to when revocation by a later instrument is effective. 2 BOWES-PARKER, PAGE ON WILLS, § 21.49 *et. seq.* (1960). It appears, however, that under a statute like REVISED CODES OF MONTANA, § 91-126 (1947), courts are likely to hold that revocation by a later instrument is effective on execution of the later instrument. 2 BOWES-PARKER, *supra* at § 21.55, note 8.

<sup>9</sup>ATKINSON, *supra* note 3 at 385 *et. seq.*

limited extent it is codified by the pour-over statute, R.C.M. 91-321, which is discussed below.

U.P.C. 2-511. TESTAMENTARY ADDITIONS TO TRUSTS.

R.C.M. equivalent: 91-321.

U.P.C. 2-511 is a pour-over provision similar to R.C.M. 91-321 but somewhat more inclusive. R.C.M. 91-321 seems to permit a pour-over only to a trust which has been "created" and "established" before or concurrently with execution of the testator's will. Presumably this requires that the trust have some corpus, even though R.C.M. 91-321 makes clear that the trustee's interest in an insurance policy which remains subject to change of beneficiaries by the settlor is a sufficient corpus. U.P.C. 2-511, however, requires only that the recipient trust be ". . . established or to be established" and that its terms be set forth in a writing, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator. U.P.C. 2-511 expressly indicates that a pour-over can be effective regardless of the existence of the corpus of the recipient trust.

U.P.C. 2-511 seems somewhat more inclusive than R.C.M. 91-321 in respect to the effect of amendments to the recipient trust. R.C.M. 91-321 permits administration of the poured-over property in accordance with amendments to the recipient trust made before or after execution of the testator's will but before his death. U.P.C. 2-511 permits administration in accordance also with amendments made to the recipient trust after the testator's death, if his will so provides. Thus, U.P.C. 2-511 permits greater flexibility in administration, to meet changing conditions.

U.P.C. 2-512. EVENTS OF INDEPENDENT SIGNIFICANCE.

R.C.M. equivalent: None.

U.P.C. 2-512 codifies the common law rule which allows a will to be construed by reference to an act which has significance independent of the will.<sup>10</sup> Under that doctrine, a testator may make a bequest to "persons who shall be my partners at the time of my death." *Stubbs v. Sargon*, 3 My & Cr 507, 40 Eng. Rep. 1022 (1838). That doctrine does not appear in the statutes of Montana, except to a limited extent in R.C.M. 91-321, the pour-over statute.

U.P.C. 2-513. SEPARATE WRITING IDENTIFYING REQUEST OF TANGIBLE PROPERTY.

R.C.M. equivalent: None.

U.P.C. 2-513 allows a testator to dispose informally of nonbusiness tangible personalty, such as guns, cameras, fishing tackle, linens, or



china, without meeting the requirements of incorporation by reference or of the doctrine relating to events of independent significance. Under U.P.C. 2-513, the testator need only refer in his will to a written statement or list by which he will dispose of this type of property and then make the statement or list in his own handwriting or in a writing signed by him. The statement or list need not exist at the time of execution of the will and need have no purpose other than disposing of the listed property. It may be altered after its preparation.<sup>11</sup>

U.P.C. 2-601. REQUIREMENT THAT DEVISEE SURVIVE TESTATOR BY 120 HOURS.

R.C.M. equivalent: None: Compare R.C.M. 91-423 through 91-430.

Under U.P.C. 2-601, a devisee who does not survive a testator by 120 hours is treated as if he had died before the testator, unless the testator has made some other provision dealing with the problem. The approach of the U.P.C. here is similar to that adopted as to intestacy in U.P.C. 2-104. This is a broader approach than that of the Uniform Simultaneous Death Act, R.C.M. 91-423 through 91-430, which applies only if there is insufficient evidence that persons died other than simultaneously. U.P.C. 2-601 seems preferable, as it would save expense and possible passage of property to unintended persons in cases in which a devisee survives but not long enough to enjoy his devise.

U.P.C. 2-602. CHOICE OF LAW AS TO MEANING AND EFFECT OF WILLS.

R.C.M. equivalent: None: Compare 91-319.

This provision allows a testator to name a state the law of which will govern the meaning and effect of his will, unless that law is contrary to the public policy of Montana. This provision may be useful either if the law of Montana would produce a result a testator does not like or if the law of Montana is unknown, for lack of a clear statute or judicial precedent. It may be useful also if a testator owns land in a state other than his domicile and wants the same law to apply to all of his property.

R.C.M. 91-319 merely states the usual rule that the law of the domicile governs as to personality and the law of the location as to land.

U.P.C. 2-603. RULES OF CNSTRUCTION AND INTENTION.

R.C.M. equivalent: 91-201.

U.P.C. 2-603 probably was intended merely to state the usual rule that the intention of a testator governs the construction of his will, as far as possible. That is the effect of R.C.M. 91-201. U.P.C. 2-603

<sup>11</sup>This provision departs from common law. ATKINSON, *supra* note 3 at 396, note 14. It is a concession to the common desire of lay testators for flexibility in dealing with personal effects.

says, however, that, "The intention of a testator as expressed in his will controls the legal effect of his dispositions. . . ." Taken literally, this might allow a testator to provide, effectively, that the Rule against Perpetuities shall not apply to his dispositions; that is probably not the draftsman's intention.

U.P.C. 2-604. CONSTRUCTION THAT WILL PASSES ALL PROPERTY; AFTER-ACQUIRED PROPERTY.

R.C.M. equivalent: 91-141.

Under U.P.C. 2-604, a will normally passes all property a testator owns at death, including property acquired after execution of his will. Like R.C.M. 91-141, U.P.C. 2-604 replaces a contrary common law rule as to land.

U.P.C. 2-605. ANTI-LAPSE; DECEASED DEVISEE; CLASS GIFTS.

R.C.M. equivalent: 91-139, 91-227.

U.P.C. 2-605, taken with U.P.C. 2-601, limits its anti-lapse provisions to a group narrower than that covered by R.C.M. 91-139. R.C.M. 91-139 applies to devises or bequests to any ". . . child, or other relation. . . ." U.P.C. 2-605 applies only to devises to a testator's grandparents or their lineal descendants.

U.P.C. 2-605 and R.C.M. 91-139 are similar in that both pass property to issue of a devisee and are ineffective if a devisee leaves no lineal descendants. U.P.C. 2-605 benefits only those issue of a devisee who survive a testator by 120 hours. R.C.M. 91-139 speaks of a devisee or legatee who ". . . dies before the testator, leaving lineal descendants . . .," without specifying whether the lineal descendants of a devisee must survive the testator to take.

U.P.C. 2-605 provides expressly that it applies to class gifts regardless of whether a potential member of a class dies before or after execution of a will. R.C.M. 91-139 leaves the question of applicability to class gifts open.

Incidentally, the annotations to R.C.M. 91-139, which state that it applies only to devises, are based on old cases and are misleading. That section now clearly applies to both bequests and devises.

U.P.C. 2-206. FAILURE OF TESTAMENTARY PROVISION.

R.C.M. equivalent: 91-126 and 91-127.

Under U.P.C. 2-606(a) if a devise other than a residuary devise fails, the property devised falls into the residue. Although R.C.M. 91-126 and 91-127 state that all property not otherwise effectually devised or bequeathed passes under a residuary clause and thus are somewhat broader than U.P.C. 2-606(a), they do cover the problem dealt with by it.

U.P.C. 2-606 provides that, if a devise to one of two or more residuary devisees fails, his share passes to the other residuary devisees, if 2-605 doesn't apply. This section settles a conflict which exists in the absence of such a statute, and probably settles it as a testator would prefer.<sup>12</sup>

U.P.C. 2-607. CHANGE IN SECURITIES; ACCESSIONS; NONADEMPTION.

R.C.M. equivalent: None.

U.P.C. 2-607 provides that the intended devisee of a specific devise of securities receives only so much of the securities as the testator owns when he dies, plus stock dividends, apparently; securities of other entities received through changes in corporate form; and additional securities received through reinvestment in regulated investment companies. Cash dividends distributed prior to death would not pass to the devisee.

U.P.C. 2-608. NONADEMPTION OF SPECIFIC DEVISES IN CERTAIN CASES; SALE BY CONSERVATOR; UNPAID PROCEEDS OF SALE, CONDEMNATION OR INSURANCE.

R.C.M. equivalent: None.

U.P.C. 2-608(a) provides that a devisee of specifically devised property receives the net proceeds of the devised property if a conservator has sold the property or received a condemnation award or the proceeds of insurance, unless there is an adjudication that the testator's disability has ceased and he has survived that adjudication by one year.

U.P.C. 2-608(b) provides that a specific devisee receives any balance due a testator on the price of property he sold, plus any security interest of the testator; any unpaid amount of a condemnation award; any proceeds unpaid on fire or casualty insurance on the property; and property owned by the testator as a result of foreclosure or in lieu of foreclosure of security for a specifically devised obligation.

In the situations dealt with by U.P.C. 2-608, the common law would typically hold that the devisee gets nothing, although there are contrary holdings in some situations. U.P.C. 2-608 seems better designed to effectuate the probable preference of testators, without the necessity of distorting a specific devise into a demonstrative devise.

U.P.C. 2-609. NON-EXONERATION.

R.C.M. equivalent: 91-131.

Under U.P.C. 2-609, specifically devised property remains subject to security interests, without exoneration, regardless of a general direction to pay debts. This may also be the effect of R.C.M. 91-131, al-

though the primary purpose of that section may be to provide that encumbering property does not revoke a testamentary gift of it. The general common law rule, contrary to U.P.C. 2-609, called for exoneration.

U.P.C. 2-610. EXERCISE OF POWER OF APPOINTMENT.

R.C.M. equivalent: 91-214 through 91-217.

U.P.C. 2-610 provides that a general residuary clause or a disposition of all of a testator's property does not impliedly exercise powers of appointment; for an exercise to occur, there must be a specific reference to the power or some other indication of intent to exercise the power. This reverses what appears to be the rule of R.C.M. 91-214 through 91-217 and reverts to the usual common law rule.<sup>13</sup>

This provision is desirable in view of section 2056(b)(5) of the Internal Revenue Code, which encourages testamentary gifts with general testamentary powers of appointment as devices for qualifying for the federal estate tax marital deduction. U.P.C. 2-610 would prevent inadvertent exercise by a surviving spouse, in a case in which the draftsman of the will creating the power did not require express exercise.

U.P.C. 2-611. CONSTRUCTION OF GENERIC TERMS TO ACCORD WITH RELATIONSHIPS AS DEFINED FOR INTESTATE SUCCESSION.

R.C.M. equivalents: 67-212, 91-404, 91-405, and 91-411.

U.P.C. 2-611 provides that testamentary gifts to classes shall be construed, in respect to half-bloods, adopted persons, and illegitimates, in accordance with the rules governing intestacy, except that an illegitimate will not be treated as the child of its father unless the father openly and notoriously treated him as his child. As to illegitimates, this provision may not be so broad as R.C.M. 91-404, under which a father can make his illegitimate child his own heir by a written acknowledgment, without more. R.C.M. 91-404 on its face is not clear as to what is needed for an illegitimate to inherit through his father; it seems to suggest that there must be both marriage of the child's parents and acknowledgment of the child or adoption of him into the family.

U.P.C. 2-611 and 2-107, taken together, indicate that half-blood relatives would share testamentary gifts to classes with whole-blood relatives.

U.P.C. 2-612. ADEMPMENT BY SATISFACTION.

R.C.M. equivalent: 91-235 and 91-311.

U.P.C. 2-612 provides against ademption by satisfaction in the absence of provision in a will for it, contemporaneous written declaration

by the testator, or written acknowledgment by the devisee. The effect of R.C.M. 91-235 appears similar, except that it does not refer to acknowledgment by the devisee. U.P.C. 2-612 and 2-110 separate the concepts of advancement and ademption by satisfaction, which R.C.M. 91-235 scrambles.

U.P.C. 2-612 also provides that the property given inter vivos is valued when the donee gets possession or enjoyment or when the donor dies, whichever occurs first.

#### U.P.C. 2-701. CONTRACTS CONCERNING SUCCESSION.

R.C.M. equivalent. None.

U.P.C. 2-701 does not allow proof of a contract to make or not to revoke a will unless a will states the material provisions of the contract, or a will refers expressly to the contract and extrinsic evidence proves its terms, or a writing signed by the decedent evidences the contract. Under U.P.C. 2-701 execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

#### U.P.C. 2-801. RENUNCIATION OF SUCCESSION.

R.C.M. equivalent: None.

U.P.C. 2-801 permits an heir, devisee, appointee under a power of appointment, beneficiary, or a successor to a renounced interest to renounce his interest. It also states the mechanics for making a renunciation and a period within which it must be made.

The purpose of this section is primarily to allow an heir the same freedom to renounce that a devisee has. It has been thought that an heir cannot renounce, so that he takes title regardless of his intent and makes a gift to another if he tries to renounce.<sup>14</sup> Thus, the heir may incur liability for the federal gift tax. Also, there may be a question of whether the approach of *Hardenburgh* creates difficulty in using disclaimers in post-death planning related to the marital deduction.<sup>15</sup> Thus, U.P.C. 2-801 should facilitate post-death revision of testate and intestate dispositions of property without bad tax results.

#### U.P.C. 2-802. EFFECT OF DIVORCE, ANNULMENT, AND DECREE OF SEPARATION.

R.C.M. equivalent: None.

U.P.C. 2-802 provides that a person who is divorced from a decedent or whose marriage to a decedent was annulled is not the decedent's surviving spouse. A mere decree of separation is not a divorce

<sup>14</sup>*Hardenburgh v. Commissioner*, 198 F.2d 63 (8th Cir. 1952), cert. denied 344 U.S. 836 (1952).

<sup>15</sup>See 1 CCH FEDERAL ESTATE AND GIFT TAX REPORTER, § 2101.03, which states that a disclaimer must be a valid refusal under state law.

for the purpose of this section. Most significantly, U.P.C. 2-802 treats a person as divorced if he obtains or consents to a decree, regardless of whether the decree is valid in Montana. Although the drafting is not clear, U.P.C. 2-802 appears to have been intended to give this same effect to an invalid decree obtained by the decedent, if the person in question participates in a marriage ceremony with a third person after the decree.

Under U.P.C. 2-802, a person who was a party to a valid decree of separation with an order purporting to terminate all marital property rights is not a surviving spouse.

U.P.C. 2-802 is expressly incorporated by reference into U.P.C. 2-508, which provides for revocation by divorce, and should be read also in conjunction with U.P.C. 2-204, which deals with waiver of rights by a surviving spouse.

**U.P.C. 2-803. EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, JOINT ASSETS, LIFE INSURANCE AND BENEFICIARY DESIGNATIONS.**

**R.C.M. equivalent:** None.

U.P.C. 2-803 provides that a surviving spouse, heir, devisee, beneficiary of insurance, or appointee who feloniously and intentionally kills a decedent shall not take any benefits. The property passes as if the killer had predeceased the decedent. In the case of a joint tenancy, the killing severs the joint tenancy so that the decedent's share passes as his property and the killer has no rights by survivorship; apparently the killer retains his own share. Montana cases suggest that the killer may retain his own share.

U.P.C. 2-803 provides that a conviction of felonious and intentional killing is conclusive and that in the absence of a conviction, the court may decide by a preponderance of evidence whether the killing was felonious and intentional. Presumably, the civil court may also decide, in the absence of a conviction, whether there was a killing by the person in question.

U.P.C. 2-803 protects bona fide purchasers, insurance companies, and banks which have acted without notice of a claim based on its provisions.

**U.P.C. 2-901. DEPOSIT OF WILL WITH COURT IN TESTATOR'S LIFETIME.**

**R.C.M. equivalent:** None.

U.P.C. 2-901 provide for confidential deposit of wills of living persons with a court for safekeeping. This is designed to enable a testator to avoid the possibility that his will may be lost or accidentally destroyed, with the difficulties that arise in using provisions like those in R.C.M.

U.P.C. 2-902. DUTY OF CUSTODIAN OF WILLS; LIABILITY.

R.C.M. equivalent: 91-801.

U.P.C. 2-902 requires a person with custody of a will to produce it on the death of the testator. If he fails to do so, he may be liable for damages and may be subjected to a penalty for contempt of court, if he disobeys an order to deliver the will.

The effect of U.P.C. 2-902 is similar to that of R.C.M. 91-801, but not quite the same. U.P.C. 2-902 requires delivery to a person able to procure probate or, if none is known, to a court; R.C.M. 91-801 requires delivery to a court or to the executor named in the will. R.C.M. 91-801 does not mention liability of the custodian for a penalty for contempt of court, although presumably such liability is possible.

### CONCLUSION

The U.P.C. benefits both the lawyer and the public. For example, because such open questions as the effect of the anti-lapse statute on class gifts are settled, the lawyer will be better able to predict the results of his drafting or potential litigation. Furthermore, the lawyer may continue to use all of the formal ceremony he thinks appropriate to the execution of wills and may also take advantage of the additional machinery provided by the U.P.C. concerning self-proved wills.

The advantages are twofold. For the lawyer, the U.P.C. should minimize the chances that his mistakes or omissions will frustrate the intentions of a testator. As a consequence, there will be less exposure to charges of malpractice and less public dissatisfaction with lawyers. For the public, the U.P.C. can result in considerable savings of time and money in the handling of decedents' estates.

The U.P.C. does not attack present problems piecemeal. Rather, it is a new concept, complete in itself. The result of the U.P.C. is to make the entire law of wills and estates more responsive to the needs of the public. Therefore, the writer believes that the U.P.C. should be enacted as it is drafted. To tinker with the drafting at this point could only serve to reduce the benefit that the public stands to realize from the enactment of the U.P.C.<sup>16</sup>

<sup>16</sup>*Sikora v. Sikora*, ..... Mont. ...., 499 P.2d 809, 910 (1972); *In re Cox' Estate*, 141 Mont. 583, 380 P.2d 584, 585 (1963). For additional material, the reader should see the bibliography given by Professor Wellman at the conclusion of his article, *Law Teachers and the Uniform Probate Code*, reprinted from 24 JOURNAL OF LEGAL EDUCATION 180 and available from West Publishing Company. Both forms and explanatory text are available also in the *Uniform Probate Code Practice Manual* published by the Association of Continuing Legal Education Administrators and printed by New Jersey Appellate Printing Co., Inc., 399 Pearl Street, Woodbridge, New Jersey 07095.